

# Problem-Solving Justice and Alternative Dispute Resolution in the Italian Legal Context

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## Abstract:

*Over the last 20 years, the Italian legislature has invested in alternative dispute resolution (ADR) methods with the aim of reducing the workload of the courts. Despite the progress of the ADR movement in Italy, it very soon became clear that ADR could not become a true alternative to traditional litigation: the parties and their lawyers still appear to prefer the court. This essay will initially provide an overview of the recent developments of ADR in Italy, especially mediation, as a means of problem-solving justice. This will be followed by an analysis of why the mediation process has failed and how mediation should be enhanced by judges (judicial conciliation). Then, the paper will conclude by attempting to synthesise the links between judicial mediation and the principle of therapeutic jurisprudence.*



## Rezumat:

*În ultimii 20 de ani, legiuitorul din Italia a investit în metode alternative de soluționare a disputelor (ADR), cu scopul de a reduce volumul de lucru al instanțelor. În ciuda progresului înregistrat de mișcarea ADR în Italia, foarte curând a devenit clar că ADR nu putea deveni o alternativă adevărată la litigiul tradițional: părțile și avocații acestora par să prefere încă instanța. Acest eseu va oferi inițial o imagine de ansamblu a evoluțiilor recente ale ADR în Italia, în special, medierea, ca mijloc de justiție pentru soluționarea problemelor. Aceasta va fi urmată de o analiză a motivului pentru care procesul de mediere a eșuat și a modului în care medierea ar trebui să fie consolidată de judecători (conciliere judiciară). Apoi, lucrarea se va încheia cu o sinteză a legăturilor între medierea judiciară și principiul jurisprudenței terapeutice.*

**Keywords:** alternative dispute resolution, arbitration, mediation, judicial conciliation, therapeutic jurisprudence

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## 1. Introduction

The inefficiency of civil justice is one of the main issues of the current political and institutional debate in Italy. There are various reasons for this inefficiency: despite a high productivity in terms of courts' output, the Italian civil justice system is characterised by a high level of litigiousness compared to other European countries.<sup>224</sup> The inefficiency also affects the Courts of Appeal, whose workload remains high despite a recent legislative reform.<sup>225</sup> Delay in the resolution of disputes is also caused by limited resources (both human and economic) of the justice administration, by frequent legislative changes, the low court fees, and according to some

authors, by the high number of lawyers.<sup>226</sup> Lastly, the enforcement of civil and commercial claims suffers from excessive delays in court proceedings, and today the creditors are likely to remain dissatisfied because of the economic crisis of the last decade.<sup>227</sup>

Since 1990, sectorial reforms of the civil process have succeeded year after year, but the poor results are there for all to see, and, according to the *Doing Business Report*, the backlog of the civil justice system has also contributed to the reduction of investment by foreign companies in Italy.<sup>228</sup>

The length of proceedings is less serious in the criminal justice system thanks to the Code of Criminal Procedure

<sup>224</sup> For more on the issues involved, see R. Caponi, *The Performance of the Italian Civil Justice System: An Empirical Assessment*, (2016) *The Italian Law Journal*, no. 1, p. 15.

<sup>225</sup> Italy's civil court system is divided into three levels: the tribunals and the judge of the peace, in the first instance; the courts of appeal, and the Supreme Court of Cassation. There are 140 tribunals and, 26 courts of appeal. Each tribunal hears cases in its geographical area, usually where the defendant resides. Claims with a value less than or equal to 5,000 euros are heard by judges of the peace, while tribunals are competent for larger claims and claims with an undetermined value. Furthermore, tribunals have exclusive jurisdiction over claims of enforcement, false or fraudulent lawsuits, status and capacity of people, honorary rights and some tax matters. Italy's Supreme Court of Cassation (known as the 'judge of the legitimacy') is the highest court in the civil system: the court hears appeals from the appeal courts and, in some cases, may hear directly from the tribunals, but it does not rule on the merits of the case.

<sup>226</sup> This thesis has been maintained in Italy for a very long time, at least since 1921 when Pietro Calamandrei wrote the essay '*Too Many Lawyers!*' Some authors identify two channels through which the number of lawyers may affect litigation, see A. Carmignani & S. Giacomelli, *Too many lawyers? Litigation in Italian Civil Courts*, (2010) p. 745: 'The first channel is the pricing effect: more competition may result in lower costs of legal services. Since this reduces the overall litigation costs for individuals, ceteris paribus, it is more likely that individuals will decide to bring a dispute before a court. A second and more specific channel derives

from the nature of credence goods of legal services. (...) Overtreatment, in the market for legal services, can take various forms. For instance, lawyers may persuade their clients to bring a case to court even when it is not in their best interest, because of the low value of the claim (compared to costs) or because the case has a low probability of success. Alternatively, lawyers may provide an unnecessarily sophisticated treatment of the case (writing complex acts and memorials, requesting hearings of unneeded witnesses).'

<sup>227</sup> E. Silvestri, *The Never-Ending Reforms of Italian Civil Justice* (2011), <<https://ssrn.com/abstract=1903863>>, pp. 1-2. The backlog in civil litigation has been so extreme that, in 2001, Italy's Parliament passed a law entitling litigants to recover compensation from the justice system for excessive delays in civil cases (the so-called *Legge Pinto*), as a legislative response to the high number of violations of the 'reasonable time' requirement enshrined in Article 6 of the European Convention on Human Rights (ECHR), T. Galletto & R.L. Mattiaccio, 'Mediation in Italy: a Bridge Too Far?', (2011) *Dispute Resolution Journal*, 66, no. 3, pp. 78-88.

<sup>228</sup> The advantages of alternative dispute resolution methods will benefit not only its civil justice system by reducing its caseload, but they will also help the economy by easing the fears of foreign investors who are currently reluctant to invest in Italy because of the inefficiency of the courts. The *Doing Business Report* (2017) shows that it takes 1,120 days to enforce a contract through the courts in Italy, compared to an average of 553 days in the Organisation for Economic Cooperation and Development countries with the highest income.

(issued in 1988), which represented an overhaul of the system, with the introduction of alternatives to trial. In this context, to facilitate a more effective case solution and to reverse the dramatic state of ordinary civil justice, the Italian Government and Parliament have considered solving civil justice problems outside the courts by using alternative forms of dispute resolution, with regard to EU legislation.<sup>229</sup>

Therefore, although problem-solving justice is an important issue in Italy, at this moment there are no problem-solving courts in the Italian legal system, and no types of problem-solving justice are being practiced apart from alternative dispute resolution methods, mediation in particular.<sup>230</sup> The reason for this is

well-known: the main goal of the Italian legislature has been to streamline civil justice and ADR offer a speed of resolution that courts generally cannot match, which is essential for litigants, especially if they are corporations.<sup>231</sup> Moreover ADR methods allow parties to be able to predict their legal costs; mediation and interests-based negotiation also help parties to maintain their relationships.<sup>232</sup> For that reason, this paper is focused on ADR as a subject related to problem-solving Justice in Italy.

## 2. The latest Italian reform in the field of arbitration

Arbitration in Italy is mainly governed by the provisions set forth in Articles 806-840 of the Code of Civil Procedure

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<sup>229</sup> Most of the Italian legislation on ADR (except labour conciliation and judicial conciliation) has its origin in the framework of EU's consumers' access to justice. The attention for ADR began particularly in the 1990, with the Green Paper on Consumer Access to Justice of 1993, and it continued through the 2000s with the directive 2013/11/EU of the European Parliament and of the Council of 21 May 21st, 2013 on the ADR dispute resolution of consumers, and the EU Regulation n. 524/2013 relating to the online disputes of consumers. Later, the Italian Government and the Parliament promoted the use of arbitration and, in particular, mediation, as faster and cheaper alternatives to going to court in civil and commercial disputes.

<sup>230</sup> While the Commission of the European Communities Green Paper on Alternative Dispute Resolution on Civil and Commercial Disputes (19 April 2002) provides that 'Alternative methods of dispute resolution, for the purposes of this Green Paper, are defined as out-of-court dispute resolution processes conducted by a neutral third party, excluding arbitration proper (...). Arbitration is closer to a quasi-judicial procedure than to an ADR as arbitrators' awards replace judicial decisions,' the Italian situation is quite peculiar and the few out-of-court proceedings like arbitration, mediation and assisted negotiation are referred under the acronym ADR, see G.F. Colombo, 'Alternative Dispute Resolution (ADR) in Italy: European Inspiration and National Problems', (2012) 29 *Ritsumeikan Law Review*, pp. 71-80; M.H. Martuscello, 'The State of the ADR Movement in Italy: The Advancement of Mediation in the

Shadows of the Stagnation of Arbitration', (2011) *New York International Law Review*, no. 24, pp. 49-98.

<sup>231</sup> P. Moreschini & G. Saltzeberg, 'Mediation Goes Mainstream in Italy', (2012) *The International Dispute Resolution News*, p. 2: 'The Ministry of Justice in Italy is, in fact, attempting to resolve the problems of the serious backlog of the Italian courts. The data published by the Ministry of Justice indicate that, of 4.8 million registered cases per year, 4.6 million decisions are rendered by the Italian judges per year. The difference between the number of new cases and the number of concluded proceedings has brought about, through the years, a backlog of approximately 5.6 million pending cases. It is clear that the obligatory attempt at mediation imposed for numerous types of cases was included as a measure to decongest the courts and to broaden the instruments available to citizens to resolve disputes in a system in which access to the courts' jurisdiction is still viewed as the sole and exclusive remedy for dispute resolution.'

<sup>232</sup> On the other hand, in June 2014, the Ministry of Justice introduced an online civil trial (*Processo Civile Telematico*, PCT) into the Italian legal system, which aims to develop the availability of online judicial services to improve procedures and the exchange of documents between courts and professionals involved in civil cases. A party can lodge a claim either by filing a hard copy of the petition or an electronic one. As soon as the clerk uploads the submission into the proceedings folder, briefs and exhibits are immediately available for the judge and for the other party.

(CPC), amended and restated on different occasions over the years, lastly, in 2006, by Legislative Decree no. 40, whose main purpose was to modernise and internationalise Italy's arbitration system.

Due to Articles 24 and 25 of the Italian Constitution, recourse to arbitration is only voluntary. In Italy, arbitration is the only alternative to judicial litigation that provides binding awards. When choosing arbitration, the parties make the decision to divest the courts of the jurisdiction over their dispute. There are many advantages of arbitration, including confidentiality, the possibility for the parties to choose the arbitrators from experts in a particular field and the flexibility of the procedure. In Italy the main advantage of a recourse to arbitration remains the possibility to have a quicker decision, but the court system is still by far the most common dispute-resolution mechanism due to the high costs of arbitration.<sup>233</sup> So, the use of arbitration is almost limited to high value disputes, in which a quick decision is more important than every other thing.

Recently, the Italian Government has enacted Legislative Decree n. 132/2014, converted into Act no.162/2014, containing urgent measures to reform the Italian civil judicial system and to deal with the backlog of pending cases. The main changes introduced by the decree include the possibility of transferring pending cases, either at first instance or on appeal, from the ordinary courts to a special lawyers' arbitration, conducted by panels comprising lawyers who have been members of the relevant Italian bar for more than five years (Article 1). In order to access this special procedure, a joint request (by all parties) to the judge is required to verify that the dispute is

eligible for arbitration, according to the legal requirements (for example, the dispute must not concern non-disposable rights under Italian law, i.e. inalienable rights, employment or social security matters). The trial will be abandoned and the dispute will continue before the arbitrators, without prejudice to the effects already produced by the claim brought before the court. The award rendered has the same effects as a court judgment and the parties do not need a court order for executions (as provided for by Article 824-bis of the CPC).

Though the law is too recent to allow a verification in terms of reducing the number of court litigations, no cases are being reported of disputes referred from court to this special arbitration. Judges and lawyers are not interested in this umpteenth legislative reform, but it is assumed that the first reason for the failure of this procedure is the cost for the parties, who have already paid for an ordinary trial and would have to pay for arbitration again. So, there is no advantage for the parties to refer their dispute from the ordinary courts to arbitration, because the time they could save by using arbitration is not worth the extra expense.

An increased use of arbitration seems unlikely in the near future unless there are additional legislative reforms. In reality, the government authorities that have promoted this kind of arbitration have not demonstrated great insight into the Italian economic crisis: as it is well known, arbitration is quite expensive and we do not expect to reduce the backlog of the civil justice system without giving attention to the economic conditions of people.

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<sup>233</sup> The only national statistic of the number of arbitration proceedings in Italy is the analytical statistic on the administered proceedings by public or private arbitration institutions, the most famous

of which are the Italian Association for Arbitration (AIA), established in 1958, and the Chamber of Arbitration of Milan (CAM), established in 1985 as a branch of the Chamber of Commerce of Milan.

### 3. Mediation in civil and commercial disputes

Like arbitration, mediation has been well-known in Italy for a long time, but as a means of dispute resolution it has only started to receive attention over the last 20 years.<sup>234</sup>

Models of conciliation have been applied in the fields of civil and commercial disputes since the passing of the Chamber of Commerce Reform Law no. 580/1993, which supported the creation of arbitration and conciliation chambers to solve 'business to business' and 'business to consumer' disputes.

In 2003, by Legislative Decree no. 5, the Italian legislature introduced a special procedure of arbitration (Articles 34-37) and an out-of-court proceeding of conciliation (Articles 38-40, today repealed). For the first time, rules regulating mediation services were issued and a register for conciliation bodies was established with the Ministry of Justice.

Specific conciliation procedures were also entrusted in the field of services of public interest. These include the conciliation proceeding administered by CoReCom (*Comitato Regionale per le*

*Telecomunicazioni*) for disputes in communications matters, and the CONSOB's (*Commissione Nazionale per le Società e la Borsa*) conciliation for finance and investment service disputes between investors and financial agents; another conciliation procedure is administered by the Bank of Italy to ensure transparency in banking services.

For a long time in labour and social security disputes, the parties have been required to make a mandatory proceeding before bringing a case to court. In this instance, conciliation takes place before administrative bodies (provincial offices). The attempt to reach an amicable settlement of labour and social security disputes became optional by Law no. 183/2010.<sup>235</sup>

The European Union has played a fundamental role in the dissemination of the culture of mediation in Italy.<sup>236</sup> The key year was 2010, when Italy was one of the first EU member states to implement the EU Mediation Directive (2008/52/EC), which imposed on member states the introduction of mediation procedures for cross-border disputes on civil and commercial matters.<sup>237</sup>

<sup>234</sup> The word 'mediation' (*mediazione*) has been used in Italy since the implementation of the EU Directive 2008/52 about civil and commercial issues. Before that, the mediation procedure was more commonly known as 'conciliation' (*conciliazione*), a non-adjudicatory dispute resolution procedure in civil and commercial matters, while the word mediation in Italy traditionally referred to procedures in family law or cultural disputes. In the Italian legal systems we can also distinguish some kinds of mediation: from the perspective of the relationship with the trial, we can distinguish out-of-court mediation from judiciary (court-annexed) mediation; from the perspective of the contested subject-matter, we can distinguish mediation in civil and commercial matters, family mediation and criminal mediation; moreover, we can distinguish some cases occurring in which mediation has to be attempted (mandatory mediation) and some other where mediation is voluntary.

<sup>235</sup> In early 2002, in Italy there was a proliferation of legislative initiatives to streamline civil rights. Article 7 of Act no. 129/2004 (*Rules for the*

*Regulation of the Franchising*), governs a mandatory mediation for franchising disputes; Legislative Decree no. 206/2005 (*Consumer Code*), reorganises Italian consumer legislation, and encourages the use of mediation and other means of alternative dispute resolution; Act no. 55/2006 (*Amendments to the Civil Code on Family Agreements*), introduces Article 768-*octies* in the Italian Civil Code, for which disputes related to family agreements must be managed by mediation bodies recognised by the Italian Ministry of Justice.

<sup>236</sup> See supra note 6.

<sup>237</sup> In addition, in 2002, the European Commission released the Green Paper on alternative dispute resolution in civil and commercial matters, and in 2003 the Commission published a Code of Conduct for Mediators to ensure that 'a high quality of mediation services are offered throughout the Community'. We also remember the two recommendations released in 1998 and 2001 in the field of consumer disputes, as a consequence of the growing number of cross-border disputes.

Legislative Decree no. 28/2010 was issued by the Italian Government to implement the directive and also to fulfil the provision contained in Article 60 of Law no. 69/2009, which entrusted the Italian Government with the task of introducing one or more legislative decrees focusing on the subject of mediation and conciliation in the civil and commercial fields.

For the first time, Italy had a uniform regulation on mediation, without distinguishing between domestic and cross-border mediation, and it only applied to claims involving rights which can be freely disposed of by the parties (so-called 'diritti disponibili'). But, at the same time, the mediation lost much of its flexibility: the initial and final stages of the procedure are considerably regulated, with several provisions intending to encourage the parties to reach an agreement, avoiding the court system. For the same reason, the legislative decree provides some tax incentives for the parties.<sup>238</sup>

The purpose was clear: to solve the serious judicial backlog, introducing a mandatory extra-judicial mediation attempt for many litigious matters, which represent over half of all the legal disputes in the Italian legal system (Article 5, paragraph 1).<sup>239</sup>

In 2012, Article 5, paragraph 1 of Legislative Decree no. 28/2010 was challenged before the Constitutional Court, which stated the unconstitutionality of the mandatory mediation attempt and

of certain other provisions directly connected to the compulsoriness of the attempt. The Italian Constitutional Court quashed compulsory mediation due to an 'over-delegation'. The government had not been expressly delegated by the Parliament to introduce the mandatory pre-trial mediation.

After a few months, mediation re-entered into force in the Italian legal system by Decree no. 69/13, converted into Act no. 98/2013. So, today, the new Article 5, paragraph 1-bis Legislative Decree no. 28/2010 provides that those who want to bring action relating to a dispute over joint ownership, rights in rem, division, inheritance, family agreements, renting and commodate contract, renting of a company, damages arising from medical malpractice and healthcare liability, defamation through the press or by other means of advertising, insurance, banking and financial contracts, are obliged to attend a 'first meeting' before a mediation body recognised by the Ministry of Justice.<sup>240</sup> In this phase, the mediator explains the aim and the few rules of the proceeding to the parties and their lawyers, in order to evaluate together whether to solve the dispute through mediation or not. If the 'defendant' does not accept to participate to mediation, he or she may receive sanctions later in court.

In addition, mediation may also be obligatory when judges invite or order the parties to mediation (Article 5, paragraph

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<sup>238</sup> Any document relating to the mediation procedure is exempted from taxes or fees. The mediation agreement is also exempted from any registration fee up to a value of 50,000 euros. In the event of settlement, each party is granted a tax credit of up to 500 euros which may vary depending on the fees paid by parties to the ADR provider. In the event of a negative outcome, a tax credit is granted of up to 250 euros.

<sup>239</sup> One year after the enactment of the law,

mediation became mandatory for disputes listed in Article 5, para. 1, Legislative Decree no. 28/2010 (actually, Art. 5, par. 1 bis). According to statistics obtained by the Ministry of Justice, when mandatory mediation was in operation (March 2011-October 2012), 215,689 mediations were initiated, with an average success rate of 12%.

<sup>240</sup> Unlike the original version, the amended list of Art. 5, para. 1 bis Legislative Decree no. 28/2010 does not include car accident disputes.

2, Legislative Decree no. 28/2010),<sup>241</sup> or as a consequence of a specific clause contained in an agreement and/or in the corporate provisions (Article 5, paragraph 5, Legislative Decree no. 28/2010).

The law defines mediation as an activity carried out by a neutral and impartial third party (the mediator) with the purpose of assisting two or more parties to reach a possible and amicable agreement. Mediation services may be offered only by public or private bodies registered with the Ministry of Justice, which sets the standards for mediation providers, the means of registration and mediation fees and maintains the register of mediation providers (*'Administered mediation'*).<sup>242</sup> The mediation procedure is conducted by a mediator, enrolled at a mediation centre, who is independent and impartial towards the parties and the matter of the dispute.<sup>243</sup> There is no public register of mediators, but the Ministry of Justice regularly publishes a list of the mediation organisations to which the individual mediators belong.

The legislative decree provides a maximum duration of the mediation process (three months, Article 6). The term begins on the date at which the

request for mediation is made. If parties reach an agreement, it may be enforced by the lawyers, when parties are assisted by lawyers, who should check whether the agreement does or does not violate the public order or binding law; or by the president of the court in charge, when parties are not assisted by lawyers (Article 12).<sup>244</sup>

As it is known, there is no consensus among authors on one exhaustive definition for the process of mediation, and over time different styles of mediation have developed, but the most widespread style of mediation is 'problem solving' mediation, whose aim is to facilitate communication between the parties. Instead, Article 11 of the Legislative Decree no.28/2010 gives the Italian mediation model a pragmatic 'evaluative' approach: if no agreement is reached, the mediator can issue a non-binding proposal about resolution of the dispute, which the parties may choose to accept or refuse (however, the mediator is obliged to issue a non-binding proposal if the parties, mutually, request for it).<sup>245</sup> The provision of Article 11 runs counter to the scholarly debates of the past years about methods and good techniques of

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<sup>241</sup> Art. 5, para. 2, Legislative Decree no. 28/2010 provides that during a trial (even before a second instance court), the judge may provide for the implementation of a mediation process. The implementation becomes a condition for the admissibility of legal action and, therefore, if mediation is not initiated, the judge shall declare the claim inadmissible.

<sup>242</sup> Parties can choose the mediation provider, even though there is a territorial competence criteria, disposable by agreement of all the parties involved in the proceeding. Decree no. 180 of 18 October 2010 of the Ministry of Justice (subsequently modified by Decree no. 145 of 6 July 2011) regulates the mediation service that the accredited bodies may manage. Every mediation body has to approve its own mediation rules.

<sup>243</sup> Mediators must have a degree, or be chartered by a professional order, and they are required to have attended a specific course with a

final exam. Ministry of Justice Decree no. 145/2011 requires each mediator to attend refresher courses of at least eighteen hours every two years and to have a specific training.

<sup>244</sup> E. D'Alessandro, 'Enforcing agreements resulting from mediation within the European Judicial Area: A comparative Overview from an Italian Perspective', in G. Barth et al., *Online-Mediation in Cross-Border Disputes* (2013), pp. 89-94.

<sup>245</sup> F.C. Colombo, 'Alternative Dispute Resolution (ADR) in Italy: European Inspiration and National Problems', (2012), *Ritsumeikan Law Review*, no. 29, p. 79: 'Also, theoretically speaking, Italian legislation is somehow a hybrid between evaluative mediation and facilitative mediation. But theoretical framework seems to be of importance only for scholars and mediation trainers, not much for legislators, mediation practitioners or even for the parties themselves.'

mediation.<sup>246</sup> The nature and characteristics of the mediation process is to promote an amicable settlement, preferably through a facilitative approach based on interests and needs, while in the evaluative approach the mediator will be more focused on the legal issues of the disputes.<sup>247</sup>

The mediator's proposal is not binding, but parties must be carefully consider their refusal. If mediation fails, each party may commence a lawsuit: if the final judgment is equivalent to the mediator's proposal, the judge may deny the winning party's entitlement to recover expenses of the trial and of the mediation procedure. When the final judgment is not equivalent to the mediator's proposal, but there are valid reasons that reasonably justifies the sanction, the judge may still require the winning party to pay their own expenses (Article 13).<sup>248</sup>

Despite the mandatory mediation attempt and despite the sanctions laid down in Article 8, paragraph 4-bis (the legislative decree allows the judge at the future trial to assess the extrajudicial behaviour and the truancy of the party, frequently when one of the parties is a bank or an insurance company), the number of the mediation processes is low.<sup>249</sup> In 2011 it was reckoned that mandatory mediation attempts would have generated about 1,000,000 new proceedings per year, but they did not. The reason is simple: mediation is mandatory only regarding the ordinary trial, but in the Italian civil justice system

**Lawyers are suspicious of mandatory assisted negotiation; they think it useless because for them pending causes before courts are nothing but failed negotiations.**

there are so many special trials (precautionary proceedings, cease and desist orders, etc..) in which mediation is not mandatory. Taking into account the length of an ordinary trial, parties act through special trials when it is possible.

The limited success achieved in Italy by mandatory mediation can be explained by a few critical issues: the essence of mediation, the negative reaction of legal professionals and cultural resistance in the population.<sup>250</sup>

The key to a successful mediation lies in it being a voluntary proceeding, where parties have autonomy in the resolution of their dispute and there is the possibility to terminate it at any time. For this reason, mandatory mediation is incompatible with the very nature of the mediation process, and it affects the proceeding's ability to achieve its specific purpose.

Moreover, the Italian legislature has not taken into account the peculiarities of the Italian legal culture. Despite the fact that lawyers are mediators by law (Article 16), and despite the fact that they must

<sup>246</sup> C. Consolo, 'L'improcrastinabile radicale riforma della legge Pinto, la nuova mediazione ex d.leg. n. 28 del 2010 e l'esigenza del dialogo con il Consiglio d'Europa sul rapporto tra repubblica italiana e art. 6 Cedu', (2010) *Corr. Giur.*, p. 425.

<sup>247</sup> The original draft of the law provided for a mediator's duty to make a proposal when parties were unable to reach an agreement. The current version of Article 11 is the result of a debate among scholars and practitioners that concerns the risks connected with the abuse of a proposal by

mediators.

<sup>248</sup> The percentage in which the mediator makes a proposal resolving the dispute ranged from 1% to 3%.

<sup>249</sup> According to statistics of the Ministry of Justice, 215,689 mediations were initiated between March 2011 and October 2012, with an average success rate of 12%.

<sup>250</sup> See *Ministry of Justice Annual Report* (2010), pp. 40-41.



advise their clients when mediation is voluntary or mandatory for their case and about the advantages of the proceeding (Article 4), lawyers are traditionally hostile to mediation.<sup>251</sup> Lawyers are both worried about losing their role in the society and their work before the courts due to mediation (however statistics show that parties were assisted by lawyers in 80% of mediations).<sup>252</sup> But first, they are afraid to change their attitudes and the techniques they studied at university and refined practicing before the courts. According to the *adversarial approach*, the best lawyer is the one who overcomes the opposing counsel, and an agreement with the other party is a sign of weakness of their legal position.<sup>253</sup> Mediation represents a reaction to the psychological brutality of the adversary system. It provides a less traumatic means of resolving conflict, seeking to focus parties on their needs and interests underlying their positions,<sup>254</sup> but it is clear that mediation will not grant a positive outcome if the parties are not sufficiently prepared or assisted by attorneys familiar with it.<sup>255</sup>

Like lawyers, judges are also sceptical of mediation, and their position still

remains ambivalent. Some Italian courts have launched and promoted pilot projects on mediation, which have enjoyed success locally, but many judges still have reservations about the procedure.<sup>256</sup>

The model of mandatory mediation has not achieved the desired result of reducing the civil justice workload, mainly because of cultural problems. In a system based upon the predominance of judgment and authoritative decision-making,<sup>257</sup> it is difficult for parties to accept an informal procedure without the court's formalisation (the individual responsibility rather than an authority's imposition). It makes more sense for them to let the judge decide rather than try themselves to solve their dispute with a mutually satisfactory interest-based agreement. If a paradigm shift is desirable, we have to abandon not only the *adversarial approach* but also the traditional *iurisdictio* model that implies the intervention of a third subject, endowed by the public authorities, with the task of settling the dispute by applying the rule of law to a specific case.<sup>258</sup>

<sup>251</sup> Italy's national lawyers' union (*Organismo Unitario dell'Avvocatura*) called for a national strike in opposition to the mandatory mediation law from 16 to 21 March 21, 2011.

<sup>252</sup> See Ministry of Justice's mediation statistical analysis between 1 January and 1 December 2017; V. Vigoriti, 'Mito e realtà: processo e mediazione', (2010) *Rass. forense*, no. 1, pp. 44-46.

<sup>253</sup> See, inter alia, N. Andrews, 'I metodi alternativi di risoluzione delle controversie in Inghilterra', in V. Varano, *L'altra Giustizia. Giuristi stranieri di oggi*, (2007), p. 8.

<sup>254</sup> L.A. Waldman, 'The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence', (1998) *Marquette Law Review*, no. 1, p. 160.

<sup>255</sup> P. Moreschini & Saltzeberg, 'Mediation Goes Mainstream in Italy', (2012), *The International Dispute Resolution News*, *Supra* note 8, p. 5.

<sup>256</sup> G. De Berti, *Mandatory mediation: the Italian experience two years on*, <<https://www.internationallawoffice.com/Newsletters/>

*Arbitration-ADR/Italy/De-Berti-Jacchia-Franchini-Forlani-Studio-Legale/Mandatory-mediation-the-Italian-experience-two-years-on?redir=1#1*> (last visited 10 September 2018).

<sup>257</sup> According to the Ministry of Justice, by 30 September 2017 the number of pending cases in civil, commercial and labour matters before the Court of Rome, first instance, was 126,914, while in the full year 2017 there were just 166,989 requests for mediation across Italy.

<sup>258</sup> G. Conte, 'The Italian Way of Mediation', (2014), *Yearbook on Arbitration and Mediation*, p. 195; R. Caponi, *Adesione e partecipazione alla mediazione*, <<http://www.judicium.it/wp-content/uploads/saggi/179/Caponi%20II.pdf>> (last visited 10 September 2018); G. Conte, *Cultura della iurisdictio vs. cultura della mediazione: il difficile percorso degli avvocati italiani verso i sistemi di A.D.R.*, (2012), *Osservatorio di Diritto Civile e Commerciale*, p. 175; G. De Palo & P. Harley, 'Mediation in Italy: Exploring the Contradictions' (2005), *Negotiation Journal*, no. 21, pp. 469-470.

#### 4. The judicial attempt at conciliation<sup>259</sup>

During the proceedings, Italian judges are called to encourage the conciliation of the parties in some cases.<sup>260</sup> In the framework of the Civil Procedure Code, the attempt at conciliation before a judge is regulated in a few norms: Article 183 of the CPC provides an attempt of conciliation at the first court appearance of parties 'when the nature of the case permits', but the judge may renew the attempt during court proceedings (Article 185 CPC); Article 322 of the CPC provides an attempt of conciliation before a justice of the peace (a judge whose jurisdiction is limited to small claims);<sup>261</sup> Article 420 of the C.P.C. provides that a labour-court judge may always attempt conciliation between the parties during proceedings, regardless of whether the right at issue is alienable or not; Articles 707 and Art. 708 of the C.P.C. provides that the President of the Court is required to attempt conciliation for the legal separation of spouses.

When seeking to reconcile the parties, the judge simply investigates and explains to them the possibility of reaching an agreement, without playing an active role. If an agreement is reached, the parties sign a conciliation report before the judge, and the report constitutes an enforceable order. Regrettably, this kind of procedure has never been successful in Italy. The

failure of judicial conciliation is not only due to the lack of confidence among lawyers, but also to the lack of trained judges as mediators.<sup>262</sup>

#### 4.1 In particular: the judicial attempt at conciliation in Article 185-bis of the Italian Code of Civil Procedure

Recently, a new section in the Civil Procedure Code (Article 185-bis CPC, entitled 'Reconciliation Proposal by the Judge') was added by Law Decree n. 69/2013 ('Decreto del Fare'). The rule has been deeply modified by the conversion of the law decree into Law no. 98/2013: the current version of the Article provides that the judge, at the first hearing or before the termination of the evidence-taking phase of the proceedings, may suggest to the parties a settlement or conciliation proposal to the parties, bearing in mind the nature, the value of the dispute and the issues, which can be resolved easily and readily.<sup>263</sup>

In order to prevent the parties from filing a motion for recusal based only on the fact that the judge has made a settlement or conciliation proposal, Article 185-bis of the CPC provides that the judge's proposal cannot constitute grounds for his or her recusal or abstention.

Judicial conciliation in Article 185-bis of the CPC differs from the pre-existing rules because the law provides for an

<sup>259</sup> In order to distinguish this proceeding (administered by a judge, but non-adjudicative at the same time) from the mediation process described above, it is better to define it as 'conciliation'. See supra note 11.

<sup>260</sup> In the first Italian Civil Procedure Code (1865), the heading of the introductory seven articles was 'conciliation'. The Fascist period (1922-1943) disliked conflict resolutions reached by private citizens: so, in the Code of Civil Procedure issued in 1942 (the current rules of the Italian civil trial) there are few norms about the attempt at conciliation's attempt before the judge (Arts. 183, 185, 322, etc.).

<sup>261</sup> In particular cases, a justice of the peace can also administer an extra-judicial conciliation.

<sup>262</sup> E. Silvestri, 'ADR Italian style: Panacea or Anathema?', in C.H. van Rhee et al., *Civil Justice Between Efficiency and Quality: from Ius Commune to the CEPEJ*, (2008), p. 249; M.H. Martuscello, 'The State of the ADR Movement in Italy: The Advancement of Mediation in the Shadows of the Stagnation of Arbitration', (2008) *New York International Law Review*, p. 49.

<sup>263</sup> F. Ferrari, 'The Judicial Attempt at Conciliation: the new section 185-bis of the Italian Code of Civil Procedure', (2014), *Russian Law Journal*, no. 2, p. 81.

active role of the judge, who may suggest a settlement or a conciliation proposal to the parties, after having heard them. An active role of the judge means granting him or her more powers to help parties resolve their dispute. Even though Article 185-bis of the CPC provides for the possibility of making a settlement or a proposal at the first hearing, it would be better for a judge to wait for the evidence taking phase of the trial in order to have more elements. The settlement and the conciliation proposal are significantly different, even conflicting. While the word 'settlement' has a strictly contractual connotation, arising from the *petita* of parties, and reaches a negotiated solution involving reciprocal concessions, 'conciliation' refers to a non-adversary dispute resolution manner, aiming to achieve a solution acceptable to both parties who are pursuing their interests.<sup>264</sup>

Article 185-bis of the CPC, as originally phrased before its conversion into law, stated that the unjustified refusal to the settlement or conciliation proposal by the parties constituted a conduct which the judge may consider when deciding the case, regardless of the possible coincidence between his or her proposal and his or her decision of the dispute. Instead, the rule, as presently drafted, does not provide for sanctions or negative consequences of an unjustified refusal by parties to accept the judicial proposal.

Article 185-bis of the CPC makes clear a dual role of the judge: he or she can make a proposal of settlement or conciliation (similar to a mediator in the

evaluative mediation process) but, in the event that the parties refuse the proposal, the judge shall maintain the power to decide the dispute.<sup>265</sup>

### 5. Assisted negotiation

Another interesting development with regard to the variety of ADR methods in the Italian legal system, is the assisted negotiation procedure, introduced by the Legislative Decree no. 132/2014, converted with amendments into Act no. 162/2014.

Introduced on the basis of the French model (Law no. 2010-1609 of 22 December 2010),<sup>266</sup> the Italian assisted negotiation refers to an agreement ('Convenzione di negoziazione') through which the parties agree to cooperate, in good faith, to settle the dispute amicably. Although this procedure has a lot in common with mediation (in terms of negotiation techniques and the spirit that should characterise the parties and their consultants), it must not be confused with the mediation procedure, regulated by Legislative Decree no. 28/2010. Both are instruments of dispute resolution that are alternative to court proceedings, but they are considerably different forms due to the presence of an impartial third party in mediation, while the assisted negotiation is handled directly by the parties' lawyers, in a face-to face negotiation.<sup>267</sup>

Like mediation, assisted negotiation can be mandatory or voluntary: the negotiation is mandatory in disputes of less than 50,000 euros, excluding those cases in which the mediation is already

<sup>264</sup> Ibid., p. 90.

<sup>265</sup> A. Scarpa, 'Ruolo del giudice e potere delle parti nell'udienza di trattazione', (2010) *Il Corriere del merito*, p. 905.

<sup>266</sup> In turn, the French legislature has been inspired by the United States models, where the concept of 'collaborative law,' recalled by the French legislator, was originally developed, see F. Cuomo Ulloa, 'Modelli di conciliazione nell'esperienza

nordamericana', (2000) *Riv. Trim. Dir. Proc. Civ.* no. 4, p. 1283.

<sup>267</sup> The two procedures are not interchangeable, but, on the contrary, they can interact. When mandatory mediation has to be carried out (Art. 5, para. 1-bis), the parties may preliminarily choose assisted negotiation: if this procedure fails, they will be in any case compelled to proceed with the mediation attempt before being able to go to court.

compulsory, and actions for damages resulting from motor traffic, regardless of their value.<sup>268</sup> The party wishing to file a judicial claim for the above matters shall invite the other party to enter into an assisted negotiation. If the other party does not reply within 30 days, the claim can be filed in court. On the other hand, if the parties agree to enter into a negotiation process, there are two possible outcomes: either an agreement is reached and the settlement agreement becomes binding as if it was an enforceable decision, or an agreement is not reached and legal proceedings can be started. There is also a tax benefit for the parties involved in a successful assisted negotiation.

Here too, though the law is too recent to allow for a verification in terms of reducing the number of court litigations, Italian scholars have expressed serious concerns about the possibility of assisted negotiation keeping large amounts of cases from reaching the courts. Nevertheless, some success has been recorded in family law matters, where assisted negotiation is always voluntary and it allows couples to separate or divorce in a few months.<sup>269</sup>

Lawyers are suspicious of mandatory assisted negotiation; they think it useless because for them pending causes before courts are nothing but failed negotiations. As we mentioned above about mediation, lawyers' attitude towards mandatory

assisted negotiation may be changed with a new lawyer class. To obtain this result, we have to abandon the 'adversarial approach' and the 'iurisdictio' model as the only way to solve disputes. This should be viewed as something long-term, starting with studies at university. If lawyers are appropriately trained in ADR methods, they will have no difficulty accepting their new role, as legal experts who advise and assist parties before and during the trial.

### **6. Mediation in penal matters**

For the sake of completeness, we will briefly mention mediation in criminal matters. In Italy, mediation in penal matters is in its initial stages, because criminal procedure was and remains governed by the constitutional principle of legality (Article 25), which means that every case must be prosecuted by judicial authority.

Despite this, the principle was broken in juvenile justice, when Italy adopted a new code of criminal procedure for minors (DPR no. 488/88), that laid the foundations for a profound cultural transformation. The core of the law is minors' personalities and the idea that minors had to be guaranteed the right to grow up and be educated in order to be able to be rehabilitated, and that this was a collective duty which could not be neglected or underestimated.

It is clear that the Italian juvenile justice system made use of intervention

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<sup>268</sup> The procedure is not a mandatory step for a number of special proceedings: injunctive proceedings, preventive technical expertise directed to settle the dispute, opposition against enforcement proceedings, camera proceedings, and actions for damages in criminal proceedings, which may be directly initiated by the interested party.

<sup>269</sup> For couples who have no children who are minors or adult children lacking capacity, the agreement is submitted to the public prosecutor at the competent court who, as long as he or she does not find any irregularities, notifies the lawyers that there is no impediment to the settlement. For

couples with children who are minors or adult children lacking capacity, the agreement must be sent within 10 days to the public prosecutor's office at the competent court for verification that it will guarantee the interests of the children. If the assessment is positive, the public prosecutor authorises it; otherwise, the prosecutor sends it to the president of the court, who convenes the parties within the next 30 days. The agreement reached and authorised in this way has the effects and takes the place of judicial separation or divorce provisions and changes the conditions set out therein.

techniques of restorative justice. This approach is put into practice by giving to judges some tools to use during initial phase of the proceeding, a variety of flexible measures (such as judicial pardon, nonsuit for irrelevance of the fact, special conditions, house arrest, suspended sentence and probation), before sentencing young people to incarceration.<sup>270</sup>

Although the law does not include a specific provision for 'victim-offender mediation' (VOM), nor is the term mediation ever mentioned, the Department for Juvenile Justice of the Ministry of Justice has relied on its web site to encourage the experimental application of VOM, and a few norms are currently used to apply mediation practice (see Articles 9, 27, 28, 30 and, 32, DPR n. 448/1988).<sup>271</sup>

In the pre-trial phase, according to Article. 9, mediation can take place during the assessments of the personality of the young person: a judicial authority can ask social services to collect information in order to allow the prosecutor and the judge to acquire information about the youth to evaluate his or her level of responsibility and social relevance of the facts. This practice is useful for a more suitable evaluation of the minor's personality, but not only this; it also makes the youth face his or her responsibilities, and it increases the dialogue with the judicial authority.

But the norm that most commonly applies VOM is Article 28, the regulation

governing the institute of probation, consisting of the suspension of the trial until a later time at which a sentence will be given. During the time of suspension, the juvenile may participate in projects with the purpose of promoting his or her rehabilitation and a positive outcome of the sentence. Also in this case, the judge asks social services or VOM services for mediation/reparation. If the outcome of the mediation is positive, the judge may proceed by dismissing the case or giving judicial pardon.

VOM is not widely implemented in Italy and based on local experiences they are not equally distributed around the country, governed by memoranda of understanding between the judicial authority and mediation providers or social services. Juvenile lay judges and social workers participated in the creation of mediation groups and they represent the majority of VOM mediators. The will of the parties is indispensable to start a mediation: all VOM services provide face-to-face mediation between victims and juvenile offenders which helps to establish communication and shared emotions between them.<sup>272</sup> Regrettably, VOM was attempted in a very low percentage of cases. After initial enthusiasm in the years 1995-1997, today VOM is rarely applied because of the cultural backlog, and the scarce government investment in social policies.<sup>273</sup>

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<sup>270</sup> The Juvenile Court (*Tribunale per i Minorenni*) is the body with competence upon the penal liability of a minor. This Court is a specialised collegiate body, as it is composed of four judges: two are ordinary magistrates, two are honorary and chosen among experts of human sciences (criminal anthropology, pedagogy, or psychology).

<sup>271</sup> A. Mestitz, *A First Survey on Victim-Offender Mediation in Italy*, <[http://www.iirp.edu/pdf/mn02\\_mestitz.pdf](http://www.iirp.edu/pdf/mn02_mestitz.pdf)> (last visited 10 September 2018).

<sup>272</sup> The first experiences of juvenile penal mediation were realised in 1995 in the city of Turin, and further developed in Rome, Trento and Bari

(1996), and Milano (1999). The procedure used in Turin is the following: the prosecutor chooses the case and asks for a mediation centre. If the mediator thinks that the case is appropriate for mediation, the prosecutor invites the victim and the offender to attend the proceeding. The procedure starts with the agreement of both parties and it continues with individual meetings. Later, the mediator meets with both the parties together and then reports the result of the mediation to the judicial authority or to social service.

<sup>273</sup> I. Mastropasqua, *1° Rapporto nazionale sulla mediazione penale minorile* (2012), p. 33.

Other instruments often used are socially beneficial work projects, which do not represent a punishment, but an important opportunity for personal growth with the possibility of rendering the minor useful within society by offering his or her contribution.<sup>274</sup>

The first act which contains an explicit reference to mediation was introduced by Act no. 247, 'Law on criminal proceedings in front of a justice of the peace', came into force in January 2002. The law permits a justice of the peace to use mediation for minor offences (threats, assault and injuries) and may promote conciliation between parties or send the parties to a public or private mediation provider. If the attempt of mediation fails, the judge may apply sanctions such as community service, house arrest and/or fines.

Another measure laid down in the same act, closer to the reparative justice's typical principles, is the 'acquittal of a case as a result of reparative conduct'. This measure allows a justice of the peace to dismiss a case when the offender can demonstrate, before he or she appears in court, that he or she has provided for the reparation of the damage done and for elimination of the offence's consequence. The judge can also suspend the trial for a period no longer than three months to allow the offender to make reparation and eliminate the damaging consequences of his or her conduct.<sup>275</sup> Regrettably, this measure has not really been put into practice.

## 7. Conclusion: judicial conciliation in a 'therapeutic key'

Over the last twenty years, the Italian legislature has invested in ADR methods, especially in the mediation process, to streamline civil justice and unclog the courts' backlog. However, very soon after the commencement of these investments it became clear that ADR could not become a true alternative to traditional litigation.<sup>276</sup>

In order to increase the use of ADR to a level that will compete with court litigations, lawmakers will not have to make more legislative reforms; rather, holistic rethinking is necessary, as well as a radical shift in judicial culture. In a system based upon the predominance of judgements and authoritative decision-making, courts might have a leading role in the development of mediation/conciliation in Italy.

The judge still remains an authority figure in the parties' perception, and they go to the courthouse expecting an embodiment of wisdom: for this reason, judicial conciliation shall be the framework wherein principles of problem-solving justice should be implemented. The mediation/conciliation conducted in a courthouse offers a *via media*, combining some of the legal and moral gravitas of adjudication with the flexibility and adaptability of ADR.<sup>277</sup> Parties require a judge's authority to gain respect for each other or to find a more constructive manner to interact with each other, but the judge does not lose his or her authority during the conciliation phase, and a

<sup>274</sup> A.C. Baldry, 'Victim-Offender mediation in the Italian Juvenile Justice System: The Role of the Social Worker', (1998), *The British Journal of Social Work*, no. 28, p. 729.

<sup>275</sup> L. Walgrave, *Repositioning Restorative Justice* (2012), pp. 290-291.

<sup>276</sup> As mentioned above, this was the goal of the recent reforms of arbitration (Legislative Decree no. 132/2014) and mediation (Legislative Decree

no. 28/2010). When compared to the amount of civil trials currently in progress, the number of ADR procedures seems minimal, see Ministry of Justice's mediation statistics between 1 January and 1 December 2017.

<sup>277</sup> L. Otis & E.H. Reitter, 'Mediation by Judges: A New Phenomenon in the Transformation of Justice', (2006) *Pepperdine Disputes Resolution Law Journal*, 1, no. 11, pp. 351, 360.

request or a proposal made from a judge has a much greater impact on parties than a similar request from a private mediator.<sup>278</sup>

Obviously, judicial mediation requires a re-conceptualisation of the role of the judges in dispensing justice and he or she must be trained in interest-based negotiation. As a consequence, we have to rethink education in the school of law in order to have judges with communication abilities, empathy and an understanding of psychological dynamics ('emotional intelligence') to focus parties on their needs and interests underlying their positions.

We must rethink the judge's role; the traditional model of the 'iurisdictio' providing for a judge, endowed by the public authorities, who decides a dispute by applying the rule of law to a specific

case, no longer meets parties' needs today.<sup>279</sup> Besides the former image of the civil judge as supervisor of the trial, is it possible to identify the judge as a settler of disputes, or a policymaker, who tries, through judicial decisions, to provide general answers to social problem of people?<sup>280</sup>

The role of the judge as a problem-solver is not far from the idea of 'therapeutic jurisprudence' (TJ).<sup>281</sup> TJ is the study of the role of the law as a therapeutic agent. It focuses on the role of the court in improving the well-being of parties to its processes. Therapeutic Jurisprudence and mediation are closely linked non-adversarial perspectives of law which have compatible aims and similar values and share a common background.<sup>282</sup> TJ practices require judges to use a problem-solving capacity,

<sup>278</sup> J. Resnik, 'Managerial Judges', (1982) *Harvard Law Review*, p. 374; M. Galanter, 'The Emergence of the Judge as a Mediator in Civil Cases', (1985-1986) 69 *Judicature*, p. 257.

<sup>279</sup> This idea of the judge's role is apparently far from the traditional model of the 'iurisdictio'. The term 'iurisdictio' comes from the Latin word 'ius' (law) and 'dicere' (to speak), and it means 'to explain the law, to administer justice'. In the most ancient Roman trials, the 'iurisdictio' belonged to magistrates and was different from 'iudicatio', the power to make a decision that belonged to the judge. The 'Legis actiones' procedure (which dates from the 5th century BC until the late 2nd century BC), was characterised by the division of the trial into two stages: the first taking place before a magistrate, under whose supervision all preliminaries were arranged; the second held before a judge who decided the issue. It was only at the end of the 1st century BC, with the beginning of a new kind of trial, that 'iurisdictio' and 'iudicatio' became synonymous (V. Mannino, *Introduzione alla storia del diritto privato dei Romani*, (2008) p. 95).

<sup>280</sup> M.R. Ferrarese, 'Civil Justice and the Judicial Role in Italy', (1988) 13/2 *Justice System Journal*, p. 168.

<sup>281</sup> B.J. Winick, 'Therapeutic Jurisprudence and Problem Solving Courts', (2002) 30 *Fordham Urban Law Journal*, p. 1055. 'Therapeutic Jurisprudence,' developed in the USA, started to gain recognition in the 1990s. TJ provides the theoretical foundation for problemsolving courts, specialised tribunals established to deal with specific problems (such as drug addiction and mental illness, which drive

reoffending), characterised by active judicial involvement and the explicit use of judicial authority to motivate individuals. Traditionally, TJ was closely associated with problem-solving courts in the field of criminal law, and it is argued that TJ could make a huge contribution towards enhancing the speed and outcome of civil and commercial litigations, as well as improving participant satisfaction and both interprofessional and professional-claimant relationships (see UK and Sweden experience). TJ may be one of the most novel legal paradigm shifts in modern times, M.S. King & K. Auty, 'Therapeutic Jurisprudence: An Emerging Trend in Court of Summary Jurisdiction', (2005) 30 *Alternative Law Journal*, p. 69.

<sup>282</sup> S. Daicoff, 'Law as a Healing Profession: The 'Comprehensive Law Movement'', (2006) 1, *Pepperdine Disputes Resolution Law Journal*, p. 11; A. Kupfeir Schneider, 'Building a Pedagogy of Problem Solving; Learning to Choose Among ADR Processes', (2000) 5, *Harvard Negotiation Law Review*, p. 113; O. Shapira, 'Joining Forces in Search for Answers: The Use of Therapeutic Jurisprudence in the Realm of Mediation Ethics', (2008) 8, *Pepperdine Disputes Resolution Law Journal*, no. 2, pp. 246-247: 'The similarity between TJ and mediation is especially evident in the case of transformative mediation and narrative mediation, the reason being that these mediation styles place the individual and his or her personal growth at the heart of the process and try to create a pleasant environment which improves the relationship between the parties.'

dealing as they do with human problems and to understand some principles of psychology.<sup>283</sup> But TJ also has been applied in an effort to reframe the role of the lawyers because it requires lawyers to practice with a particular ethic and care to the psychological well-being of their clients.<sup>284</sup>

It is clear to everyone that the trial might be unable to provide the most therapeutic consequence for the parties involved, but the judicial conciliation model, in which judges themselves act as mediators and work with the principle of TJ, will give to the parties the same benefits that come with any other form of mediation/conciliation, such as the possibility to achieve resolutions that are more tailored to the particular dispute. Consistent with the ethos of TJ, judicial conciliation shows how the process can be changed to improve the experience of individuals by providing an alternative to litigation.<sup>285</sup>

It is a fact that, after the implementation of the EU Directive on Mediation 2008, some European countries allowed judges to practice mediation within judicial conciliation by playing a conciliatory role

to make use of the methods of mediation. In Germany, the level of judicial involvement ranges from the suggestion of private mediation to mediation within judicial conciliation through the courts, where judges can be called on to assist the parties to reach an amicable settlement.<sup>286</sup>

In Italy, we can continue on the path of Article 185-bis of the CPC discussed above, allowing the judge to make a proposal of conciliation and, if the parties should fail to reach an agreement, the same judge may decide the dispute in the judgement phase of the trial which follows. However, within the perspective of comprehensive reform of judicial mediation, we also suggest that the judge must not make any settlement proposals during the conciliation phase, in order to prevent the problems related to the impartiality of the judge during the judgement phase of the process.

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<sup>283</sup> B.J. Winick & D.B. Wexler, 'Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts', (2003) p. 194.

<sup>284</sup> Mediation and TJ could be a potential combination: if mediators intervene in a dispute using TJ as their philosophical foundation, the mediation process can achieve beneficial health outcomes, see M.S. King & K. Auty, supra note 58, *Therapeutic Jurisprudence: An Emerging Trend in Court of Summary Jurisdiction*, (2005) 30 *Alternative Law Journal*, pp. 69-73.

<sup>285</sup> Ibid. pp. 98-100.

<sup>286</sup> See H-L Yu, 'Carrot and Stick Approach in English Mediation – There Must Be Another Way', (2015) *Contemporary Asia Arbitration Journal*, 8, p. 95. In Germany, after the amendment of the Code of Civil Procedure (*Zivilprozessordnung*, ZPO) by the Act to Promote Mediation and Other Methods of Out-of-Court Dispute Resolution (July 2012), §278 and 278a offer German judges the legislative

support to consider the possibility of the parties reaching a mutually agreed settlement before the judgement is made. A judge previously involved in a mediation is excluded from serving as a judge on the case. In the early 2000s, all federal states of Germany introduced pilot projects dealing with mediation within courts, and after initial rejection and criticism by conservative lawyers and judges, mediation started to be integrated into the state system of courts. In the model of 'integrated mediation' the judge acts as a mediator during the mediation phase and in the role of judge during the decision phase. In the first phase he or she only applies the mediation techniques, without making any proposal, and only after parties fail to reach agreement will the same judge make a decision, see A. Trossen, *Wege zur Kooperation: Die moderne Vergleichsverhandlung im streitigen Zivilgerichtsverfahren* (2009).