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# PARTICIPATORY JUSTICE AND MEDIATION TOWARD A NEW MODEL OF JUSTICE

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## **Abstract**

This paper provides a brief description of the model of participatory justice that is emerging in Europe and in North and South American States. Participatory justice promotes new forms of conflict resolution, as does mediation, based on voluntariness and confidentiality, as well as the participation of all parties in the management of conflict. In 2010, Italian legislators introduced mediation as an alternative form of dispute resolution in civil and commercial matters in order to reduce the burden of the Courts. This reform has not been successful so far because Italian lawmakers have introduced mediation into the civil justice system without reforming the framework of its underlying principles.

## **Keywords**

Participatory justice, mediation, access to justice, alternative dispute resolution.

## **Resumen**

El presente artículo tiene como propósito realizar una breve descripción teórica sobre el modelo de justicia participativa que está surgiendo en Europa y en los Estados del continente americano. La justicia participativa promueve métodos alternativos de

resolución de conflictos, como la mediación, caracterizados por la voluntariedad, la confidencialidad y la participación de todas las partes en la gestión de conflictos que las dividen. En 2010 los legisladores italianos introdujeron la mediación en asuntos civiles y mercantiles para reducir la carga de los tribunales. La reforma, sin embargo, no tuvo éxito debido a que los legisladores italianos establecieron la mediación sin armonizar sus principios con los del modelo tradicional de justicia.

### **Palabras clave**

Justicia participativa, mediación, acceso a la justicia, métodos alternativos de resolución de conflictos.

## Paradigms of justice: from decision to participation

All States observing the rule of the law are experiencing a crisis in their administration of justice to varying degrees. The lowest common denominator in this phenomenon is the discrepancy between social expectations and the judicial system the State offers. Both European and American citizens have expressed increasing disaffection towards judicial systems. They view as marred by slowness, burdensome costs, and inadequacy in protecting their rights and interests. It has become clear that the problem is not merely a matter of organizational efficiency, although in some cases –such as in Italy– dysfunctions in the system play a major role in the breadth of the crisis<sup>1</sup>. The roots of the crisis have to do with the modern judicial system itself: it has lost its explanatory strength and it no longer adequately responds to the waves of radical change contemporary society is experiencing. This crisis in the modern legal universe is clearly evidenced by challenges to a political order centered around the State and a legal order based upon state law as an imperative and unilateral command. Jurists do not appear to have yet perceived the radical nature of these signs<sup>2</sup>.

In order to explain the complex dynamics at play, Ost makes reference to Kuhn's famous theory according to which the evolution of scientific progress does not occur in a progressive or gradual manner, but rather via abrupt changes that sweep away a paradigm and replace it with another that is considered more apt to adequately explain and regulate reality<sup>3</sup>. A paradigm expresses a framework of theories and principles that form the backbone of the scientific community's consensus with regard to an explicative model of reality that provides researchers with solutions to emerging problems<sup>4</sup>. Whenever a paradigm is no longer capable of "containing" and explaining certain phenomena or resolving the problems these create, it experiences a crisis and is eventually replaced by a newer and more adequate alternative. According to Ost, a shift in the dominant legal paradigm is currently underway; a hierarchical, State-centered, positivist model is being challenged by a competing paradigm represented by the concept of "network", which currently coexists with the prevalent framework<sup>5</sup>. In the emerging legal model:

1. V. Ferrari, "La giustizia come servizio. Centralità della giurisdizione e forme alternative di tutela", in *Studi di diritto processuale in onore di Giuseppe Tarzia*, Tomo I, Giuffrè, Milano, 2005, pp. 47- 66.

2. F. Ost, "Dalla piramide alla rete: un nuovo paradigma per la scienza giuridica?", in *Il tramonto della modernità giuridica*, M. Vogliotti (Ed.), Giappichelli, Torino, 2008, pp. 29-48, p. 30.

3. T. Kuhn, *The Structure of Scientific Revolution*, Chicago, University of Chicago Press, 1970 2nd edition.

4. *Ibid.*, p. 43.

5. F. Ost discusses the improper use of the theory in the humanities; however, he argues for its efficacy as it relates to the contemporary legal model, whose characteristics are universally recognized, F. Ost, "Dalla piramide alla rete: un nuovo

The State is no longer the sole source of sovereignty; the will of legislators is no longer accepted as dogma; the lines between facts and rights are blurred; powers interact; judicial systems become muddled; knowledge of jurisprudence moves from methodological purity to interdisciplinary thinking; finally, the pyramidal concept of justice of yesteryear anchored by axiological hierarchies established by law is now viewed more in terms of balancing interests and values that are both varied and changeable<sup>6</sup>.

Moving away from the authoritarian nature that has characterized the modern age, the law becomes more participatory in nature both in its lawmaking processes and in how it handles conflict resolution<sup>7</sup>. While the dominant paradigm of justice is based on the State's monopoly and upon judicial decision-making as a preferred conflict resolution tool, the emerging one is characterized by plurality in the legal order and use of consensual and alternative approaches.

In this section, we will attempt to map out some of the emerging justice model's characteristics and outline how they purport to more adequately respond to civil society that demands a "proximity justice"<sup>8</sup> that is more flexible, swift and fair. To this end, we will briefly outline the access to justice movement and the rise in alternative conflict resolution tools, which have both reached transnational proportions and caught the attention of mainstream political and governmental institutions.

The response to these consensual dispute resolution trends by different legal systems has shed interesting light upon the crisis that heralds a paradigm shift. In the Italian system, these alternative methods, particularly mediation, have been viewed as "anomalies" to be pigeonholed into conceptual categories belonging to the dominant judicial model rather than as an expression of a new consensual, participatory model of justice within an emerging new paradigm.

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paradigma per la scienza giuridica?", p. 32.

6. Ibid.

7. Cfr. A. J. Arnaud, "Le sfide della globalizzazione alla modernità giuridica", in *Il tramonto della modernità giuridica*, M. Vogliotti (ed.), pp. 77-94, (p. 79).

8. A. Wyvekens, "Justice de proximité et proximité de la justice. Les maisons de justice et du droit", in *Droit et Société*, 1996, 33, pp. 1-23; J. L. Bilon, "La proximité de la justice, approche française", in *Revue de Prévention et réglementation des Différends*, 4-3, 2006, pp. 33-46.

## Access to justice and rights

“Access to justice” can be understood as a theoretical and reform-driving movement that, beginning with the second half of the last century, has made its way across the Western world and been associated with reclaiming and protecting civil rights. Instead of focusing on the nature and content of said rights, the movement has concentrated on procedural and judicial mechanisms as essential conditions for exercising the rights themselves<sup>9</sup>. Over the last fifty years, the various economic, societal and organizational obstacles to the protection of rights that engender social inequality have become the subject of research, analyses and reforms mainly focused upon procedural and jurisdiction-related aspects of the law in various nations. According to Mauro Cappelletti, one of the eminent scholars in the field, the “access to justice” movement is the greatest answer to the crisis of justice in the contemporary age because it is tantamount to a “Copernican revolution” in our way of conceptualizing the Law. In fact, there has been a shift from the traditional “Tolemaic” view wherein justice is seen from the viewpoint of those who produce or “manufacture” the law and focuses on their “product” (i.e., lawmakers and the law; public administrations and decrees, judges and sentences). The new paradigm turns attention towards the recipients of justice, “consumers of rights and law” –namely individuals, groups of citizens and society itself as a whole<sup>10</sup>.

The many meanings that “Access to justice” expresses can be placed into two broad thematic categories: the first pertains to a set of legal theories; the second concerns the reforms that, albeit to different degrees, have affected most Western nations and brought about a series of relevant changes in the judicial process.

A characteristic shared by the legal theories is a shift away from a dogmatic conceptualization of law –one of the main features of formalist legal positivism– along with some features of American legal realism, which determines the validity of law on the basis of its effectiveness rather than its formal validity. However, while legal realism theories explore the institutional domains of jurisprudence by investigating the role of the judge as a lawmaker<sup>11</sup>, they also broaden their approach to a social analysis of law by taking into account the wide network of individuals, institutions and proceedings through which it develops, takes hold, and exerts its influence.

9. M. Cappelletti, *Accesso alla giustizia*, in *Enciclopedia delle scienze sociali*, Treccani, 1988, retrieved from [http://www.treccani.it/enciclopedia/accesso-alla-giustizia\\_\(Enciclopedia\\_delle\\_scienze\\_sociali\)/](http://www.treccani.it/enciclopedia/accesso-alla-giustizia_(Enciclopedia_delle_scienze_sociali)/)

10. M. Cappelletti, *Dimensioni della giustizia nelle società contemporanee*, Il Mulino, Bologna, 1994, p. 100.

11. See G. Tarello, *Il realismo giuridico americano*, Giuffrè, Milano, 1962.

Access to justice theorists make the case for a “contextual” conception of law and view its efficacy in terms of three parameters: the social needs the law intends to respond to, the identified legal solution to problems, and the social outcomes achieved<sup>12</sup>.

This brings us to the second broad theme of access to justice: reform. The driving force behind this is the aim of abating economically driven social inequality (which reduces marginalized populations’ access to justice), organizational issues (which hamper the protection of collective interest) and procedural problems (which render traditional judicial means inadequate in fully protecting rights).

### The Florence Project on Access to Justice

The movement was conclusively defined and “consecrated” by a study coordinated by Mauro Cappelletti, entitled *Florence Project on Access to Justice*, published in 1978 and universally considered the broadest investigation of access to justice to date<sup>13</sup>. In addition to providing an impressive amount of empirical data regarding justice systems across the world, this study demarcated the theoretical underpinning of the movement through interdisciplinary methods and comparative analysis<sup>14</sup>.

In the general introduction, Cappelletti and Garth argue that “access to justice” is a useful lens through which we can evaluate the health of contemporary democracies. The expression “access to justice” refers to the two main goals of a judicial system understood as a means for people to defend their rights and resolve conflict in a state-sanctioned manner: first, the system must be equally accessible to all; second, it must aim for results that are both individually and socially just. Although the authors point out that research focuses on the first objective, they highlight that the two are intertwined: a system that aspires to social justice, as modern democracy demands, must provide all its citizens with equal chances to lay claim to and protect their rights<sup>15</sup>.

After noting that the rules and tools of a judicial process serve a social function and that a trial ought not to be viewed in terms of form and structure but rather also as a socially relevant practice<sup>16</sup>, the authors discuss three “waves” in the access to justice movement in chronological order.

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12. M. Cappelletti, *Dimensioni della giustizia*, p. 77.

13. M. Cappelletti (ed.), *Access to Justice*, Giuffrè – Sijthoff, Milano – Alphen aan der Rijn, 1978.

14. V. Denti, “Accesso alla giustizia e Welfare State (a proposito del Florence Access to Justice Project)”, in *Rivista Trimestrale di Diritto e Procedura Civile*, 1982, pp. 618-626.

15. M. Cappelletti, B. Garth, “Access to Justice: the Worldwide Movement to Make Rights Effective. A General Report”, in M. Cappelletti (ed.), *Access to Justice. A World Survey*, vol. I, book 1, p. 6.

16. V. Denti, “Sistemática e post-sistemática nella evoluzione delle dottrine del processo”, in *Rivista critica di diritto privato*, IV, 1, 1986, pp. 469-492.

The first occurred after World War II until the late 1970s and mainly focused on the issue of providing legal assistance to economically disenfranchised citizens.

Beginning in the early 1970s, a second wave of reforms followed, this time honing in on issues of collective interest; this change in traditional civil proceedings entailed a revolutionary shift from protection of individual rights towards collective action and the recognition of groups and sectors of society as holders of rights. *Class action* proceedings are a prime example of this.

Finally, the third wave occurred after the late 1970s and was characterized by an “*access-to-justice-approach*” focused upon both judicial and extra-judicial institutions and tools used for conflict resolution in public and private arenas<sup>17</sup>.

In this third phase, attention shifted from the trial to the conflict and from the barriers preventing access to the Courts to the limitations of the judicial process itself insofar as it is inadequate in satisfying the interests of all involved parties in a dispute.

Basing their argument on Frank Sander’s belief that conflict resolution tools must be tailored to different types of disputes<sup>18</sup>, Cappelletti and Garth made a case for alternate tools like arbitration, mediation and conciliation as means of improving access to justice. While the first two waves of the movement still held on to an implicitly normative and judicial orientation as evidenced by chosen legal assistance tools and the nature of the proposed reforms geared towards protection of collective rights, the third wave expressed a new legal perspective that contemplates novel conflict resolution tools as an alternative to the traditional trial. This new concept of justice is termed “coexistent” by Cappelletti: “It can bring divergent positions closer to one another, lead to solutions in which there is not necessary a winner and loser but rather mutual understanding and bilateral behavioral change”<sup>19</sup>. Going back to Ost’s hypothesis, it is precisely in this third wave that the “anomaly” of extra-judicial tools comes to the forefront in ways the dominant legal model is unable to explain or conceptually integrate.

17. M. Cappelletti, B. Garth, “Access to Justice: the Worldwide Movement to Make Rights Effective. A General Report”, p. 49.

18. M. Cappelletti, B. Garth, *This approach recognizes the need to relate and adapt the civil process to the type of dispute*, p. 52. See also F. E. Sander, “Varieties of Dispute Processing”, in A. L. Levin and R. R. Wheeler, *The Pound Conference: Perspectives on Justice in the Future. Proceedings of the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, West Publishing Co., St. Paul, Minnesota, 1979, pp. 65-87.

19. M. Cappelletti, *Dimensioni della giustizia*, p. 91.

## Alternative Dispute Resolutions Methods: a Transnational Model

While the access to justice project was developing at the University of Florence, a great justice reform movement was rising in the United States. Its aims and programs were discussed and illustrated in 1976 during the *Pound Conference* on “The Causes of Popular Dissatisfaction with the Administration of Justice”<sup>20</sup>. It was at this event that Frank Sander, a law professor at Harvard University, proposed a way of improving the justice system that deeply impacted later reforms in the American judicial process. Sanders argued that each dispute is different and each resolution approach ought to be as well; the trial is not always necessarily the best option. Therefore, he proposed that the workload of the Courts could be lightened by using alternatives to the traditional trial, such as mediation and arbitration<sup>21</sup>. The expression “Alternative Dispute Resolution Method” was coined in reference to a justice process that served as an alternative to the mainstream judicial system capable of reaching satisfactory, swift and inexpensive dispute resolution<sup>22</sup>. Over time, the “A” in *Alternative* also came to stand for *Appropriate*<sup>23</sup> in order to indicate an integrated and complementary conflict resolution method as opposed to a bipolar one based on the opposition between the State’s judicial process and private or informal mechanisms<sup>24</sup>.

Over the forty years that followed the *Pound Conference*, the expression “Alternative Dispute Resolution” has been used to define a set of dispute resolution methods<sup>25</sup> and to indicate a model of justice that is more flexible than traditionally rigid court proceedings, more in line with the people’s needs. It has come to represent a worldwide movement that, to varying degrees, has affected America, Europe, Australia and Asia<sup>26</sup>. In fact, ADR refers to a series of practices and methods that need little to no

20. A. L. Levin, R. R. Wheeler, *The Pound Conference: Perspectives on Justice in the Future*.

21. F. E. Sander, “A second way of reducing the judicial caseload is to explore alternative ways of resolving disputes outside the courts, and it is to this topic that I wish to devote my primary attention”, *Varieties of Dispute Processing*, p. 66.

22. S. Roberts, M. Palmer, *Dispute Processes, ADR and the Primary Forms of Decision Making*, Cambridge University Press, Cambridge, 2005, p. 46.

23. C. Menkel-Meadow, “Mediation, Arbitration, and Alternative Dispute Resolution (ADR)”, in *International Encyclopedia of the Social & Behavioral Sciences*, edited by N. J. Smelser, P. B. Baltes, Elsevier Science Ltd., Oxford, 2001, pp. 9507-9512. “The term ‘appropriate’ dispute resolution is used to express the idea that different kinds of disputes require different kinds of processes” (p. 9507).

24. See. P. Adler, “The Future of Alternative Dispute Resolution: Reflection on ADR as a Social Movement”, S. Engle Merry e N. Milner (Eds.), *The Possibility of Popular Justice, A Case Study of Community Mediation in the United States*, The University of Michigan Press, USA, 1993, p. 68.

25. A. J. Arnaud, J. P. Bonafé Schmitt, “Alternative (Droit) – Alternative (Justice)”, in *Dictionnaire encyclopédique de théorie et de sociologie du droit*, 2a ed., LGDJ, Paris, 1993, pp. 13-15.

26. R. Abel (Ed.), *The Politics of Informal Justice*, vol. I, Academic Press, New York, 1982; J. S. Auerbach, *Justice Without Law?*, Oxford University Press, New York – Oxford, 1983. N. Alexander (ed.), *Global Trends in Mediation* (second ed.), Kluwer Law International, Alphen aan der Rijn (The Netherlands), 2006.

adaptation to the local national judicial system<sup>27</sup>. In this sense, it is a transnational model that goes beyond the confines of State sovereignty and moves into a global judicial space supported by globalization and propelled by new challenges to those policies still based upon said State sovereignty<sup>28</sup>. A comparative analysis highlights aims and factors that can bring common and civil law closer together in a shared effort to reform the justice system<sup>29</sup>. However, Alexander warns that because social practices must be understood in the context of specific cultures, beliefs and institutions, they play out differently in diverse justice systems. Therefore, along with the principle of universality we must also consider our differences, which heed a warning against applying mediation practices in a homogenous, inflexible way across socio-geographical contexts<sup>30</sup>.

## Legal Mediation

ADR includes a wide range of practices that even experts sometimes have trouble grouping under a common umbrella: they range from heteronomous ones like arbitration (wherein a third party chosen by the disputing subjects makes a decision based upon the law) to autonomous ones<sup>31</sup> such as conciliation and mediation, wherein an impartial third party helps the disputing sides come to a resolution of common accord. Mediation is one of the chief expressions of ADR, not only because it affords flexibility in its practice and is quite adaptable to diverse contexts and legal orders, but also because of the model of social justice and order it exemplifies<sup>32</sup>.

Mediation can be defined as:

A process in which the parties and their lawyers meet with a neutral mediator whose job is to assist them in finding a resolution to the dispute at hand. The mediator facilitates effective communication and helps each party express its point

27. The European Union also welcomed the ADR acronym. In the European Commission's Green Book on civil and commercial dispute resolution methods, published on April 19<sup>th</sup>, 2002, the Commission states: "The alternative methods of dispute resolution will therefore be referred to below by the acronym that is tending to be accepted universally in practice, i.e. 'ADR'", COM (2002) Def., available from <http://eur-lex.europa.eu/legal-content/IT/TXT/?uri=celex:52002DC0196> (viewed on June 25<sup>th</sup>, 2016).

28. See M. Cappelletti, *Dimensioni della giustizia*, p. 12; M. R. Ferrarese, "Il linguaggio transnazionale dei diritti", in *Rivista di diritto costituzionale*, 5, 2000, pp. 74-108 (p. 74).

29. V. Varano, (ed.), *L'altra giustizia: i metodi alternativi di soluzione delle controversie nel diritto comparato*, Giuffrè, Milano, 2007.

30. N. Alexander, *Global Trends in Mediation*, p. 3.

31. See P. Luiso, "La conciliazione nel quadro della tutela dei diritti", in *Rivista trimestrale di diritto e procedura civile*, 58, 4, 2005, pp. 1201-1220.

32. For a broad analysis of ADR methods see M. Cicogna, G. di Rago, G. N. Giudice, *La conciliazione commerciale*, Santarcangelo di Romagna, Maggioli, 2005, pp. 40 ss.

of view and understand the other's, identifies strengths and weaknesses of both positions, thus coming to a potential solution everyone can agree upon<sup>33</sup>.

While many researchers have championed its legal soundness<sup>34</sup> and praised its social impact<sup>35</sup>, many have viewed the advent of non-judicial conflict resolution methods with great skepticism and wariness. This has been the case both in the United States, where the phenomenon began to take hold as far back as the 1970s, and in various European nations, Italy included. Some sociologists have interpreted ADR methods as a means of engendering a new political balance outside of constitutional safeguards<sup>36</sup> and some jurists have gone as far as branding them as violations of the principles of law<sup>37</sup>.

These methods have been viewed more as alternatives to justice than to the trial: "foreign bodies" inserted into the legal order for the mere purpose of unburdening the courts<sup>38</sup>. Counterarguments to such criticism have focused on efficiency, availability and social satisfaction associated with these alternative practices, but have nonetheless, failed to fully defend "cooperative" approaches as legally rightful practices supported by the principles of the legal system.

The justice landscape therefore seems to present a disjointed ensemble of methods with contrasting elements: on one hand the formal judicial process based on principles of legality; on the other, informal consensual methods that sacrifice the safeguards afforded by a traditional trial in favor of a "satisfactory" conciliation of both parties' interests.

A recent report produced by the Canadian government provides an interesting view of the phenomenon as an integrated model of justice wherein the opposition between judicial and extra-judicial methods is reinterpreted in light of legal pluralism and the principle of participation. In a sense, it approaches the issue of justice from the "Copernican" perspective championed by Cappelletti thirty years ago in the Florence project<sup>39</sup>.

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33. O. Chase, *Gestire i conflitti. Diritto, cultura rituali*, Laterza, Roma-Bari, 2005, p. 116.

34. L. Fuller, "Mediation: Its Forms and Functions", in *Southern California Law Review*, 44, 1971, pp. 305-339; L. Fuller, K. Winston, "The Forms and Limits of Adjudication", in *Harvard Law Review*, 92, 2, 1978, pp. 353-409; F. P. Luiso, "La conciliazione nel quadro della tutela dei diritti"; R. Abel (ed.), *The Politics of Informal Justice*, vol. I.

35. R. Abel (ed.), *The Politics of Informal Justice*, vol. I; J. P. Bonafé-Schmitt, *La médiation. Une justice douce*, Syros Alternatives, Paris, 1992; J. Faget, "Éloge du fluide. Une lecture socio-politique de la médiation", in *La quête anthropologique du droit*, sous la direction de C. Eberhard - G. Vernicos, Éditions Karthala, Paris, 2006, pp. 351-368.

36. L. Nader, "The A.D.R. Explosion – The Implications of Rhetoric in Legal Reform", in *Windsor Yearbook of Access to Justice*, 8, 1988, pp. 269-291.

37. O. M. Fiss, "Against Settlement", in *The Yale Law Journal*, 93, 6, 1984, pp. 1073-1090.

38. See observations by V. Ferrari, *La giustizia come servizio*, p. 47; also see P. H. Lindblom, "La risoluzione alternativa delle controversie. L'oppio del sistema giuridico?", in *L'altra giustizia*, V. Varano, (ed.), pp. 219-253.

39. See above, p. 2.

## “Transforming Relationships through Participatory Justice”: a Canadian Proposal

Beginning in the 1990s, the Canadian government sponsored a series of initiatives centered around the issue of access to justice aimed at redefining the problem and developing participative justice policies. Some particularly noteworthy reports were prepared in response to federal and provincial interest; they outlined the evolution of the access to justice movement over the course of three decades and highlighted both the inevitable need for change within the legal system and the dynamic nature of Canadian society and its institutions<sup>40</sup>.

It is therefore not happenstance that a report on participative justice published in 2003 no longer made reference to “access to justice” but rather focused on the idea of participation; in this conceptualization, justice no longer requires someone to open or shut doors to its availability but rather calls for citizens to participate in its “construction”. *Transforming Relationships through Participatory Justice* was published by the Law Commission of Canada in 2003 in response to a 2000 request by the Government, which tasked it with researching the justice system in the Federation and assessing the degree of popular satisfaction with regard to its conflict resolution functions<sup>41</sup>. The Commission’s Report expressed a view of the law as an emancipatory practice open to the initiatives brought forth by citizens and communities and it redefined the physical “places” of justice as no longer limited to the courtroom and State institutions but rather as inclusive of social and community-based contexts. In addition to framing the issues at hand within the complex needs of a multicultural society like modern-day Canada, the report highlights a series of both judicial and extra-judicial tools aimed at protecting the rights and developing a socially responsible network. The traditional trial is no longer on the main stage and is pushed aside by the need for a plurality of consensual dispute resolution methods based upon voluntary participation, informal practices and confidentiality understood within a framework of legal safeguards.

The central idea the Commission starts from is the concept of conflict in all its expressions in interpersonal relationships, be it within the family, workplace, neighborhood, community or other context requiring negotiation<sup>42</sup>. On one hand, conflict is

40. R. A. Macdonald (ed.), *Jalons pour une plus grande accessibilité à la justice: rapport du Groupe de travail sur l’accessibilité à la justice*, Ministère de la Justice, Québec, 1991.

41. Law Commission of Canada, *Transforming Relationships Through Participatory Justice*, Ottawa (Ontario), 2003, *Participatory Justice*, Ottawa (Ontario), 2003, available from <http://publications.gc.ca/site/archivée-archived.html?url=http://publications.gc.ca/collections/Collection/JL2-22-2003F.pdf> (viewed on June 25<sup>th</sup>, 2016).

42. *Ibid.*, pp. 1-3.

viewed with concern because of its potential to do damage to property, people and relationships; on the other hand, it is a natural feature of any living system which can foster growth and help groups adapt to systemic changes within familial, social or political contexts<sup>43</sup>. It is its degeneration into unhealthy behavior that can lead to destructive and sometimes irreversible consequences. Using the concept of conflict rather than dispute as a springboard for analysis allows one to view the issues from the perspective of the people who experience it first-hand rather than from a strictly procedural or institutional standpoint. The report deems the traditional justice system inadequate in responding to the people's expectations and needs, and it points out that: "Conflicts are framed in legal language, rather than in terms of how individual experience them"<sup>44</sup>. The legal translation of "conflict" into "dispute" mutilates the former by ignoring all those social aspects that are not taken into consideration in a courtroom but are nonetheless part of the social expectations of justice<sup>45</sup>.

The Commission also revisits the distinction between penal and civil law and its respective procedural rules in light of the concept of social manifestation of conflict. In fact, the report argues that current reflections on justice are limited by the consolidated distinction between civil and penal conflict<sup>46</sup>. The report associates these arenas with two forms of justice: reparative justice and consensus-based justice<sup>47</sup>. The former "refers to the resolution of a crime or conflict characterized by focus on the harm done to the victims, encourages perpetrators to take responsibility for their actions, and calls for community participation"; the second involves a range of cooperative conflict resolution methods whose chief feature is allowing the involved parties to have control over how the dispute is resolved<sup>48</sup>.

Reparative and consensus-based justice share common values: participation in the conflict management process; respect towards all parties; equal treatment in the case of consensus-based justice and strengthening of a community's autonomy in reparative justice; commitment to agreed-upon solutions; flexibility and adaptability of the process.

The Commission's intent is quite clear:

43. Cfr. E. Arielli, G. Scotto, *Conflitti e mediazione: introduzione a una teoria generale*, Bruno Mondadori, Milano, 2003; S. Castelli, *La mediazione. Teorie e tecniche*, Raffaello Cortina, Milano, 1996, p. 22.

44. Law Commission of Canada, *Transforming Relationships through Participatory Justice*, p. 1.

45. V. Ferrari, *Funzioni del diritto*, Laterza, Roma-Bari 1997, p. 153; W. L. F. Felstiner., R. L. Abel, A. Sarat, "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...", in *Law and Society Review*, (15), 3-4, 1980/1981, pp. 631-654.

46. L. Lalonde, "Le modes de PRD: vers une nouvelle conception de la justice?", in *Revue de prévention et de règlement des différends*, (1), 2, 2003, pp. 17-43, (p. 35).

47. Law Commission of Canada, *Transforming Relationships through Participatory Justice*, p. 5; 130.

48. *Ibid.*, p. 3.

Both restorative justice and consensus-based justice attempt to capitalize on the transformative potential of conflict, to use conflict as a springboard for moving toward a more just society. Participation is the key to the transformation process. Parties in conflict ought to be actively involved in finding resolutions to it. In this report, therefore, we refer generically to restorative justice and consensus-based justice as participatory processes<sup>49</sup>.

This attempt at integrating the two forms of justice by encompassing them in a cohesive framework of values seems quite original compared to the strictly separate and distinct view of them held by Italian theorists. Beginning in the 1990s, in Italy there was also a surge of research and projects centred around reparative and consensus-based justice. Universities, the Ministry of Justice and numerous private associations developed penal mediation programs<sup>50</sup>. Over the last two decades, the field of civil mediation has also grown remarkably, especially in terms of research and pilot programs mostly carried forth by Chambers of Commerce, which have played a major role in promoting and popularizing extra-judicial conciliatory activities<sup>51</sup>.

However, to date, there has been no cohesive reflection that views the reparative and negotiation-based models through the same lens in terms of issues and inspiring principles. In this sense, these two spheres have never ‘spoken’ to one another; in Italy, but have rather continued to live in the shadow of the *status quo* dictated by traditional penal and civil justice.

## Mediation in the Italian Legal System

Although Cappelletti paved the way to research on access to justice and participatory methods, Italy was one of the last countries in Europe to regulate mediation<sup>52</sup>.

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49. *Ibid.*, p. 5

50. See L. Eusebi, *La funzione della pena: il commiato da Kant e da Hegel*, Giuffrè, Milano, 1989; M. Bouchard, “La mediazione: una terza via per la giustizia penale?”, in *Questione giustizia*, 3-4, 1992, pp. 757 ss.; F. Scaparro (ed.) *Il coraggio di mediare*, Guerini e associati, Milano, 2001; C. Mazzucato, “Mediazione e giustizia riparativa in ambito penale”, in G. Così, M. A. Foddai (eds.) *Lo spazio della mediazione*, Giuffrè, Milano 2003; G. Mannozi, *La giustizia senza spada*, Giuffrè, Milano 2003.

51. See F. Cuomo Ulloa, *La nuova mediazione*, Zanichelli, Bologna, 2013; L. Cominelli, “La risoluzione delle dispute”, FrancoAngeli, Milano, 2012; F. Danovi, F. Ferraris, *La cultura della mediazione e la mediazione come cultura*, Giuffrè, Milano, 2013.

52. Starting in the 1990s, the European Union has undertaken initiatives and policies aimed at finding new tools for conflict resolution. In the 2002 *Green Book* on alternative conflict resolution tools referenced above, the EU outlines how member states have adopted alternatives to judicial approaches as a political priority aimed at improving access to justice for European citizens and favoring the development of social and commercial relationships across the Union. Directive 2008/52 of

With the implementation of Law 69/2009, Italian legislators began a process of reform of civil justice in an effort to address the “perennial” crisis of the Italian system and the people’s complaints about an institution they perceived as slow, costly, unfair and unable to meet social expectations<sup>53</sup>. On one hand, the aims of this reform involved “internal” simplification through the streamlining and reducing of the duration of proceedings (sec. 54), and on the other, “external simplification” by moving a considerable number of disputes towards mediation-based resolutions (sec. 60)<sup>54</sup>. Its guidelines reflect a policy aimed at conserving the traditional judicial model of dispute-resolution whilst simplifying and improving it via the introduction of some corrective measures. Indeed, legislators explicitly tasked mediation with relieving some of the burden from the Courts<sup>55</sup>. It was not until 2010 that mediation officially appeared in the Italian legal system. This was also a response to Directive 2008/52/EU, which obliged Member States to adopt mediation in cross-border disputes and encouraged them to also utilize it in internal disputes.

Legislative Decree 28/2010, modified in 2013, applies to disputes in civil and commercial matters and foresees four types of mediation: the first is optional and freely chosen by the parties; the second derives from a contractual clause that obliges parties to turn to mediation to settle disputes in contract implementation; the third is delegated by a judge who can request that the parties have recourse to a mediation center; the last is compulsory, and requires parties to turn to mediation before any lawsuit is filed regarding certain matters (e.g. medical liability, inheritance)<sup>56</sup>.

Mandatory mediation has been subject to harsh criticism both from the legal community and from mediators themselves<sup>57</sup>. In particular, while mediators have condemned the violation of the principle of voluntariness that is the keystone of mediation, lawyers have denounced the violation of one’s constitutional right to legal action arising from this additional, compulsory phase that, in their opinion, increases

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May 21st, “on certain aspects of mediation in commercial and civil spheres”, is the result of a process set in motion with the *Green Book*. With this measure, the Union required member states to regulate transnational disputes through mediation and encouraged them to utilize mediation for internal disputes as well.

53. V. Ferrari, “La giustizia come servizio. Centralità della giurisdizione e forme alternative di tutela”, in *Studi di diritto processuale in onore di Giuseppe Tarzia*, vol. I, Giuffrè, Milano, 2005, p. 47.

54. F. Cuomo Ulloa, *La mediazione nel processo civile riformato*, Zanichelli, Bologna, 2011.

55. See. G. Scarselli, “Sugli errori degli ultimi venti anni nel porre rimedio alla crisi della giustizia civile”, in *Il foro italiano* I, 2010, pp. 50-54.

56. Art. 5, I co., d. lgs. 28/2010. See R. Caponi, “La giustizia civile alla prova della mediazione (a proposito del d. leg. 4 marzo 2010 n. 28)”, in *Il foro italiano*, II, 2010, vol. CXXXV, pp. 89-95; F. Cuomo Ulloa, *La nuova mediazione*, pp. 113 ss.

57. V. Ferrari called this reform “baffling” and stated it was characterized by “coarseness and improvisation”, “L’amministrazione della giustizia”, p. 181; F. Sitzia, “Alcune riflessioni problematiche sul d. lgs 4 marzo 2010 n. 28 e ordini professionali”, in *Quaderni di conciliazione*, 1, 2010, pp. 111-127.

expenses and makes access to justice more difficult<sup>58</sup>. Such critical attitudes, coupled with poor knowledge of the practice, have translated into scarce confidence in the institution of mediation. This is evidenced by data published by the Department of Justice in 2011<sup>59</sup> that highlights mediation's highly problematic start in Italy. According to Taruffo:

The message legislators send to the citizen sounds something like this: since I am incapable of actually guaranteeing your rights will be safeguarded before a judge, I suggest (or demand) that you turn to mediation where perhaps you will be able to obtain something. This something will probably be less than what you might obtain from a judge, but it will still be better than nothing!<sup>60</sup>

Most lawyers and scholars therefore welcomed the Constitutional Court's December 6th, 2012 decision n. 272, which declared unconstitutional the first paragraph of art. 5 of decree nr. 28/2010, which regulated mandatory mediation as a condition of admissibility of claims in broad ranges of situations<sup>61</sup>.

Legislators turned their attention to mediation again with Law n. 98 of August 9th, 2014<sup>62</sup> and reintroduced a new mandatory form. On one hand, this law again made mandatory mediation a condition of admissibility for filing lawsuits; on the other, it transformed judge-ordered mediation by granting him/her the power to directly require the disputing parties to attempt mediation-based resolutions and suspend legal recourse, until they comply<sup>63</sup>.

Although other types of mediation were not affected by this decision and maintained their validity, over the months between the sentence of the Constitutional Court

58. See F. Delfini, "La mediazione per la conciliazione delle controversie civili e commerciali ed il ruolo dell'Avvocatura", in *Rivista di Diritto Privato*, 15/1, 2010, pp. 131-141; L. Dittrich, "Il procedimento di mediazione nel d. lgs. N. 28 del 4 marzo 2010", in *Rivista di diritto processuale*, 3, 2010, pp. 575-594; Monteleone, "La mediazione 'forzata'", in *Il giusto processo civile*, 2010, pp. 24; G. Scarselli, "La nuova mediazione e conciliazione: le cose che non vanno", in *Il foro italiano*, 5, 2010, 5, pp. 146-151.

59. Ministero della Giustizia, *Relazione sulla performance 2011*, available from [http://www.giustizia.it/giustizia/it/content-view.wp?previousPage=mg\\_14\\_7&contentId=ART779048](http://www.giustizia.it/giustizia/it/content-view.wp?previousPage=mg_14_7&contentId=ART779048). See observations by G. Floridia, "La giustizia come servizio pubblico essenziale", in *Rivista Critica Diritto Privato*, 15, 2010, pp. 136-140.

60. M. Taruffo, "Considerazioni sparse su mediazione e diritti", in *Ars interpretandi*, 9, 2004, pp. 97-112 (p. 108).

61. In Constitutional Court's opinion, neither art. 5, 3d comma, let. A of the law or the 2008/52 European directive provide evidence in favor of mandatory mediation, available from <http://www.cortecostituzionale.it/actionPronuncia.do> (viewed on June 27<sup>th</sup>, 2016).

See C. Besso, "La Corte Costituzionale e la mediazione", in *Giurisprudenza italiana*, 2013, pp. 605-609; I. Pagni, "Gli spazi e il ruolo della mediazione dopo la sentenza della Corte costituzionale 6 dicembre 2012, n. 272", in *Corr. Giur.*, 2013, pp. 262-268.

62. D. lgs. 28/2010, art. 5, 2<sup>o</sup> comma.

63. *Ibid.*

and the passing of the law, a drastic decline in mediation was observed and many mediation centers shut down.

The most important amendments have to do with compulsory mediation in the form of a mandatory informational meeting with the disputing parties and their attorneys in which the mediator outlines “the purpose and the process of mediation” and asks the parties if they are willing to undertake it. In addition to restoring the mandatory step of attempting mediation, albeit in a softer form, the law introduces some new elements: the requirement of legal assistance to the parties (attorneys must be present at all mediation meetings); a four-year term making comma 1-bis of art. 5 provisional until re-evaluation of its efficacy; finally, the Ministry of Justice’s monitoring of outcomes<sup>64</sup>.

The forcible presence of attorneys in the mediation process in some way underscores the legislators’ weakness. First, it resulted from them giving in to the pressure exerted by lawyers’ associations who oppose the liberalization of the professional mediation market. Second, it expresses the implicit belief that the disputing partners cannot be trusted to handle conflict management entirely on their own and their negotiating power ought to be ‘safeguarded’ by attorneys.

### **Incongruences in the Italian model of Justice**

Mediation in Italy seems to be headed towards increased formalization, which moves away from granting disputing parties autonomy in managing conflict, ignores the crucial issue of the mediator’s professional competence, and relegates it to a subordinate position compared to the traditional trial and its inefficiencies.

In Italy, lawmakers have seen mediation as a means of lifting some of the burden from the civil justice system, but have failed to recognize its underlying principles and significance. An analysis of the newly introduced sphere of mediation has indeed highlighted the points of incongruence between the punitive, formal and bureaucratized characteristics of the traditional judicial process and a conflict-management model based on the autonomy of all parties, voluntariness and confidentiality<sup>65</sup>.

64. F. Ferraris, “La novellata mediazione nelle controversie civili e commerciali: luci e ombre di un procedimento ‘revitalizzato’”, in *I contratti*, 10, 2013, pp. 951-964 (p. 956).

65. G. Arnone, P. Porreca, “La mediazione tra processo e conflitto”, in *Il foro Italiano*, (CXXXV), II, 2010, pp. 95-100; also see E. Fabiani, M. Leo, “Prime riflessioni sulla ‘mediazione finalizzata alla conciliazione delle controversie civili e commerciali’ di cui al d.lgs 28/2010” in *Judicium*, [www.judicium.it](http://www.judicium.it); G. Scarselli, “La nuova mediazione e conciliazione: le cose che non vanno”, in *Il foro italiano*, V, 2010, pp. 146-151; G. Canale, “Luci ed ombre ad una prima lettura dello schema di decreto legislativo di attuazione della delega in materia di mediazione” in F. Auletta F., G. Califano, G. Della Pietra, N. Rascio (eds.), *Sull’arbitrato. Studi offerti a Giovanni Verde*, Jovene, Napoli, 2010, pp. 109-121; T. V. Russo, “Alcuni aspetti controversi nella disciplina della mediazione per la conciliazione delle controversie civili” in *Mediaries*, 2010, 15/16, pp. 281-291.

As noted by Taruffo, “the choice between ADR and the traditional judicial process involves deeper and more complex cultural implications that go well beyond the mere practical concern with selecting the swiftest and least expensive way of resolving a dispute”<sup>66</sup>.

Mediation was hastily introduced into the traditional judicial system without appropriate consideration of its founding principles and/or of the social and political implications of its integration; as such, the reform has proved to be ineffective and has failed to fulfill social expectations. Placing mediation within a system based upon the predominance of judgment and authoritative decision-making almost inevitably led to the legal community’s attempt to assimilate mediation into the traditional process by harnessing it and herding it into the familiar territory of formal process and professional representation.

It is, however, important to distinguish between “centrality of jurisdiction” and “priority of jurisdiction”: the former makes reference to a constitutionally necessary activity of judicial protection of rights, as indicated by articles 24 and 111 of the Italian Constitution, while the latter has to do with a “psychological” attitude that sees formal jurisdiction as the primary, if not sole, remedy for disputes<sup>67</sup>.

Luiso argues that giving traditional judicial methods priority is the consequence of an “old legacy” which seems to be at odds with the new legal reality based upon the principle of subsidiarity, wherein the formal process is seen as a last resort in dispute management to be used only when other avenues of conflict resolution have been exhausted<sup>68</sup>.

Canada’s proposed participative justice model is the result of an effective interaction between governmental institutions and the professional/scientific community, which have cooperated in developing a new policy of justice. In Italy, we have seen a political failure caused by reluctance to opening up to new models and principles of justice designed to satisfy the needs of its citizens rather than the *status quo* of its institutions. This is why this attempt to respond to a crisis situation through the application of a new tool in the judicial system has proven to be weak and ineffective and has failed to lighten the burden on the Courts; without an adequate reflection on the inadequacy of the traditional judicial model and a now unavoidable paradigm shift, effective integration will continue to be elusive.

66. M. Taruffo, *Sui confini*, Il Mulino, Bologna, 2002, p. 31.

67. See F. P. Luiso, “La conciliazione nel quadro della tutela dei diritti”, pp. 1206 ss.

68. *Ibid.*