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## THE JUDGE POSNER DOCTRINE AS A METHOD TO REFORM THE ITALIAN CIVIL JUSTICE SYSTEM

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### ABSTRACT

*This article represents a preliminary and methodology-oriented effort to conduct an economic analysis of the Italian civil justice system, commonly perceived as inefficient and proposes a different approach. More specifically, it demonstrates how the failure of several Italian legal reforms was based on methodological errors, which led to the inefficiency of the system itself. Accordingly, it proposes an alternative in methodology.*

*For the mentioned purpose, it shall use the theories and methods studied by Judge Posner concerning the judiciary system. In particular, it shall evaluate if the Posnerian methodology could be applied to the reforms to come from the Italian judiciary system. The evaluation is carried out by assessing the behavior of judges, lawyers, and litigants based on the theory of wealth maximization.*

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*We highlight that this article is not intended to give specific solutions to the efficiency issues of Italian civil justice. Nonetheless, these pages contain examples and references that demonstrate how the application of this methodology to various Italian rules of the judiciary system could impact its efficiency. These examples represent the adaptation of Posner's applications into the Italian system, based on his concept of efficiency applied to specific Federal procedural rules concerning judges, lawyers, and litigants.*

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## INTRODUCTION

This article aims to primarily make an economic analysis of Italian civil justice. However, it represents a methodological attempt: a way to show how Italian legislators should take into account the specific economic methodology approach to solve one of the most serious problems of the Italian law system, *i.e.*, the inefficiency of its civil justice.

For the mentioned purpose, it is necessary to demonstrate what analysing the law of justice in economic terms means. The economic analysis of law has generated a robust scholarly literature within American legal debate. The literature is huge, but the interpretative touchstone is remarkably the opinion of Richard A. Posner.

The purpose of showing how Italian civil justice could be efficiently reformed starting by the Posner's view could seem weird to law-and-economics scholars since Judge Posner made—mainly—an economic analysis of law in terms of positive analysis, instead of normative analysis.

More specifically, Economics might have a positive role and a normative role in examining law and legal institutions<sup>1</sup>. A positive analysis means using Economics to explain rules, outcomes, institutions in the legal system as they are<sup>2</sup>. The role of positive analysis is thus to understand the law better simply because many areas of it (property, contract, crime), as well as individual judges' legal opinion, are affected by economic reasoning<sup>3</sup>. Indeed, the normative role means to understand how the law could be improved or reformed in terms of efficiency. The normative analysis is wealth in this sense because efficiency should be considered as a goal to be

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<sup>1</sup> See Richard A. Posner, *Some Uses and Abuses of Economics in Law*, 46 Univ. of Chica. L. Rev. 281 (1979).

<sup>2</sup> See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW*, 17 (2d ed. 1977) (suggesting that even if economics could not tell to society whether it should seek to limit theft, it can clarify how the methods used by society to limit theft are inefficient and that the society could achieve a more prevention result, at a lower cost).

<sup>3</sup> It has to be highlighted that, even if the Posnerian analysis has been mainly positive, Posner also provided, especially in respect of the reflections on judicial administration, a normative analysis, as per one of its most exciting books regarding the judicial administration. In this book Posner, starting with its economic concept of efficiency, makes some reflections on the efficiency of the judicial administration, not only examining the function of federal courts as they are but also providing ideas for specific reforms in optical efficiency. See RICHARD A. POSNER, *THE FEDERAL COURT: CHALLENGE AND REFORM* (1996).

pursued by the law and, consequently, a rule should be changed if it is demonstrated that a more efficient norm exists. This distinction is illustrated by the contrast between Guido Calabresi's work on tort law<sup>4</sup> and the Posner's one<sup>5</sup>.

In any case, readers might ask why we would like to use a positivist analysis to get specific results that seem to may proper normative analysis. The answer is more straightforward than it seems.

Posner's analysis is a worthwhile resource for our purposes in respect of the following grounds: it defines a concept of efficiency; it explains the common law as an efficient system, as well as, it considers Federal Rules and, for our purpose, specific Federal civil procedural rules as efficient.

Consequently, our effort should be to make a comparative analysis of Italian civil justice with the efficiency of common law system by using the Posner's methods to analyze the law. It thus means that this concept of efficiency should represent our compass to attempt to analyze our procedural rules on economic (efficient) terms. The Posner's view of common law as an efficient system may also help us to understand why the Italian civil law system is, on the contrary, most likely to be inefficient. Moreover, efficient procedural rules analyzed by Posner could represent models to show how to reform the Italian Civil system.

For the mentioned purpose, Part I provides to a brief introduction to the development of the law and economics in the American system in order to explain its significant role in common law system compared to its use in civil law systems, as the Italian one.

Part II concerns, therefore, the concept of wealth maximization efficiency used by Judge Posner, which, as said, could be helpful to explain how he evaluates rules in terms of efficiency.

Part III explains why, according to Judge Posner, common law could be considered an efficient system, as well as, what are types of efficient procedural rules.

Part IV regards the Italian civil system and, in particular, it reflects the error in methods of Italian last reforms that have not led a more efficient justice. Moreover, it provides examples of certain groups of norms that

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<sup>4</sup>See GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* (1970).

<sup>5</sup>See RICHARD A. POSNER, *supra* note 2; *see also* Richard. A. Posner, *A theory of Negligence*, 1 J. Legal Stud. 29 (1972)

should be modified in order to get the results of a more efficient legal system.

## I. THE ROLE OF THE ECONOMIC ANALYSIS OF LAW

The Economic Analysis of Law has been an essential part of the legal academy since the early mid-late 1970s: the initial appeal was that the application of economic analysis to the law might bring to significant changes. Nonetheless, there was a high amount of skepticism among legal scholars on the implementation of Economics to legal areas, which no regulating specific economic activities such as antitrust, tax, and corporation law. There were, in fact, opposition regarding the role of the economic theories in legal analysis, as well as the suitability to apply the concept of efficiency to legal norms. According to T. Ulen <sup>6</sup> the critics of law and economics were unjust and ill-informed, but they have also been good for law and economics itself. This because the debate that arose to respond to those criticisms and to demonstrate its utility to lawyers, judges, law professors, and law students brought to a new field in the law and economic theories, that is now a relevant part of legal scholarship and practice. It has highlighted that the first conclusions reached by Law and Economics were not significantly different from the ones reached by the traditional doctrine. However, the prominent role of Law and Economics was to provide a unifying theme and methodology for looking at many areas of law that a traditional theory had not been able to provide<sup>7</sup>.

The prominent examples of the spread of Law and Economics were the Coase Theorem articulated in Coase's 1961 widespread article regarding the social cost <sup>8</sup>, as well as the article published in the same year, by Guido

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<sup>6</sup> See THOMAS S. ULEN, *METHODOLOGIES OF LAW AND ECONOMICS*, *ENCYCLOPEDIA OF LAW AND ECONOMICS*, 2d Ed., 10, 2017, § 4-5.

<sup>7</sup>*Id.* at 2.

<sup>8</sup> See Ronald H. Coase, *The Problem of Social Cost*, 3 J. Law and Econ. 1 (1960). Coase has analyzed the relationship between rules of liability and the allocation of resources. According to Posner, Coase's article was also significant for the implication that his theory had for the positive analysis of legal doctrine. More specifically, Coase's insight was that the English law of nuisance had an implicit economic logic.

Calabresi on accident law<sup>9</sup>. These two articles represent the first attempts to apply economic theories in a systematic way to areas of law relating to nonmarket behaviors, and their theories fathered immense literature that commented on these results<sup>10</sup>.

Other relevant results are derived from the theories founded by Gary Becket. Becket had a role in opening up economic analysis to several areas of nonmarket behavior like crime, racial discrimination, marriage, divorce, reaching the result that Economics could also involve areas of law unrelated with property rights and liability rules<sup>11</sup>.

Moreover, since 1971 several scholars, whose the prominent exponent was Judge Posner, started to examine the hypothesis that the common law rules and institutions tend to promote economic efficiency<sup>12</sup>. This was not a claim only because judges or juries pursue efficiency consciously but rather because common law seems to have a sort of economic tendencies that a positive analysis could help to investigate.

It is an objective circumstance that the spread of Law and Economics became huge, especially in North America, so that in the 20th century, all young scholars referred to Law and Economics in almost every piece of their work.

On the contrary, the difficulties of the implementation of the Economics (microeconomics) Analysis of Law in Italy are well-known. It is not surprising to the traditional distress of the civil law jurist to accept specific economic-legal approaches, having an empiric basis as its starting point or founded on the doctrine of the legal precedent. Therefore, because of cultural reasons, they are closer to a common law jurist's method of analysis. Indeed, embracing this approach means to accept the idea that an empirical fact represents an indicator towards who is in a similar situation and, therefore, a term of comparison of "*inefficient equity may be brought, in a particular case, to trigger a perverse spiral of iniquity that an economic*

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<sup>9</sup> See Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 Yale L. J. 499 (1961).

<sup>10</sup> See Fred R. Shapiro & Michelle Pearce, *The Most-Cited Law Review Articles of All Time*, 110 Mich. L. Rev. 1483,1489 (2012).

<sup>11</sup> See GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOUR* (1976).

<sup>12</sup> For discussion and reference see R. Posner, *supra* note 1, at 288-291.

*model may allow understanding and, in some cases, to avoid, or, at least, to lead back to reasonable dimensions”*<sup>13</sup>.

## II. THE USE OF ECONOMICS FOR UNDERSTANDING LAW AND JUDGE POSNER’S CONCEPT OF EFFICIENCY

The traditional and most significant aspects of the Law and Economics revolution were the application of microeconomic standard tools to legal issues, as well as the importation of certain notions of efficiency, like allocative or Pareto efficiency, productive efficiency, and Kaldor-Hicks efficiency into the legal analysis<sup>14</sup>.

The application of the microeconomic standard to legal rules reflects the idea that Economics is not the subject matter supposed to study (e.g., market) but represents a methodology that helps to understand the rational choices wherever it occurs. To this effect, the law is considered a worthwhile subject to this methodology since, on the one hand, the legal disputes are wealth material to ascertain rational behaviors and, on the other hand, both Law and Economics deal with incentives deriving by constraints<sup>15</sup>.

Making an Economic Analysis of Law means, as said, using economic tools and methods to evaluate legal rules in terms of efficiency. Firstly, this approach requires to give a definition to the term “value” and “efficiency”.

Following the traditional program outlined by Judge Posner in his classic treatise, “value” represents the “*human satisfaction as measured by aggregate consumer willingness to pay for goods and services*” and, consequently, “efficiency” – named the theory of “wealth maximization” efficiency– means “*exploiting economic resources in such way that value is maximized*”<sup>16</sup>.

In this respect, Posner’s starting theory of “wealth maximization”, is based on the idea that every economic operator is rational and aims, with

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<sup>13</sup> ROBERT COOTER ET AL., *IL MERCATO DELLE REGOLE: ANALISI ECONOMICA DEL DIRITTO CIVILE*, 11 (2d ed. 2006).

<sup>14</sup> See Jules L. Coleman, *Efficiency, Utility and Wealth Maximization*, 8 Hofstra L. Rev. 509 (1980)

<sup>15</sup> More specifically, income and prices are the constraints in market reality. Indeed sanctions are the constraints in legal reality.

<sup>16</sup> See RICHARD A. POSNER, *supra* note 2, at 10.

his behaviors, to the maximization of his utility (*market behavior*). Consequently, is it plausible that people are rational only when they are transacting in markets, and not when they are engaged in other activities of life “*such as a marriage and litigation and crime and discrimination and concealment of personal information*”?<sup>17</sup>

The answer to this question is the assumption of Posner’s notion of efficiency applied to the law “*nothing less than a redefinition of economics as a study of rational choice, not limited to the market*”<sup>18</sup>. This approach requires to wear the economists’ glasses, conceiving the law (and the law of justice) as a set of incentives to citizens. Therefore, according to this approach, every rule represents, for its recipient, a cost to follow a particular behavior and, consequently, the recipient will follow this behavior only when its cost (the cost to respect it) is more convenient than ignoring it.

To the reader, the assumptions that underlie such economic theory might seem too abstract and unrealistic. This because conceiving human behavior as rational and self-interest might appear an oversimplified approach if applied to specific circumstances of everyday life and, in particular, to certain unconventional economic actors like judge, litigants, parents<sup>19</sup>. This because individual decisions are not necessarily engaged only on the basis of maximization-of-wealthy reasons but in light of personal values and principles. However, Judge Posner responded to such critics (viewing Economic Analysis of Law as a methodology to study legal reality) that abstraction is the essence of economic inquiry, as well as of other social science inquiries. To this effect, Economic Analysis of Law tries to grow up theories to predict and explain a reality and, as a consequence, it is necessary lack of realism: if a theory could explain precisely the reality and

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<sup>17</sup> See RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE*, 1 (2d ed. 1983)

<sup>18</sup> *Id.* at 3 (highlighting that the idea that people were rational maximizers of their satisfaction in all areas of human life and, consequently, the modern development of economics comes from J. Betham, who played a prominent role in the definition of Posner concept of efficiency. Another role on the definition of Judge Posner’s theories derived by Becker, who pushed economics into diverse areas as education, fertility, the utilization of time in the household, the behavior of criminals and of prosecutors, charity, prehistoric hunting slavery, suicide, adultery, and even the behavior of rats and pigeons); see also Gary S. Becker, *supra* note 11 (especially his introductory chapter).

<sup>19</sup> For a discussion of the scientific method as applied to an economic inquiry, see Milton Freedman, *The Methodology of Positive Analysis*, *Positive Economics* 3 (1953).



its complexity would not be a theory, but it would become a description of the reality automatically<sup>20</sup>.

Moreover, an in-depth analysis of the mentioned concept of Posner's wealth maximization theory requests certain clarifications.

Firstly, Posner offers the system of wealth maximization as an alternative to utilitarian moral theory. More specifically, he struggled to distinguish its theory from the utilitarianism system, following the idea that "wealth maximization" provides a firmer basis for ethical theory than utilitarianism does<sup>21</sup>. This because, according to utilitarianism doctrine, the moral value of an action, an institution and, generally, of the law, has to be judged in respect of the effect that produces on promoting happiness – the surplus of pleasure over pain – aggregated across all of the inhabitants of society. Indeed, according to the wealth maximization theory, the same moral value, calculating on the basis of what people are willing to pay for something, has to be judged by its effect on promoting social welfare.

In addition, Posner outlined the following other criticisms of utilitarianism. Firstly, it is a theory of personal morality and social justice, viewing a good man as engaging to maximize the sum total of happiness (his own plus others) and a good society as that seeking to maximize that total sum. Consequently, it is committed to promoting the total utility without regard to its distribution.

Secondly, utilitarianism considers the maximum as the broadest concept of satisfaction, not as a specific psychological status. Therefore, its domain is uncertain because the recipients of such satisfactory are too broad, and this gains to absurd consequence (pigs or sheep should also be counted in such recipients).

Moreover, it lacks a method for calculating the effect of a policy or of a decision on the happiness of the recipients because there is no a technique for measuring a change in the level of happiness of a person relative to a change in the level of happiness of another<sup>22</sup>.

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<sup>20</sup> See Richard A. Posner, *supra* note 2, at 12-14.

<sup>21</sup> See RICHARD A. POSNER, *supra* note 17, at 48-87.

<sup>22</sup> See RICHARD. A. POSNER, *supra* note 17, at 55 (highlighting that if a Pareto efficiency seems to offer a solution – a change is said Pareto superior if it makes at least one person better off and no one worse off – it can works only taking into account marginal and not total utility. Even in a voluntary transaction, which by definition, makes both parties better off than before, the condition where no one else is affected by such voluntary transaction is rarely fulfilled).

In addition, it results in certain moral monstrosity and in particular, the refusal to make moral distinctions among types of pleasure and the sacrifice of individual on the altar of social need. This, essentially, because on one hand, it allows individuals to violate important moral principles if such violation increases total utility, and on the other hand, it obliges a person to act for the benefit of others. Therefore, it is morally incompatible with the principle of moral liberty.

Against the mentioned utilitarianism background, Posner tried to gain an alternative moral system, starting with the idea that its concept of “value” does not coincide with the concept of “price”. This because even if the value is inseparable from the concept of market, the market price of a good or service is the value to the marginal purchaser: the purchasers value the good or the service as their willingness to pay more if the price is higher. Indeed, in Posner’s system, the wealth of society does not include only the market price of its goods and service but also “*the total consumer and producer surplus generated by those goods and services*”<sup>23</sup>. Consequently, the summation of all the valued objects should include both tangible and intangible in society, weighted by the prices they would command if they were to be traded in markets.

For this effect, Posner also tried to distinguish the idea of “value” by the idea of “utility”. The value is, thus, the willingness to pay for something, instead the utility is the willingness of better satisfaction (in the sense of happiness). As so, it may be assumed that even if value implies utility, utility does not necessarily imply value: if a person who would like to have a good (utility), but he is unwilling or unable to pay (value) anything for it, he does not value such good in a Posnerian sense.

Another way to show the difference between the maximization of wealth and the maximization of happiness is the idea of the hypothetical market. If the wealth of society is the aggregate satisfaction of the preferences that are moved by money, namely ones that are registered in the market, it has to be bear in mind that the market is not only explicit. There is in fact, what Posner calls a “hypothetical market”: when the court has to decide a case of liability, it has to make certain rational choice on the worth of certain circumstances for each party, and in many cases, the court makes an accurate guess on the allocation of resources that would maximize wealth. So, the court allocates goods in an efficient way where, as in the accident

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<sup>23</sup> *Id.* at 60.

case, the transactions costs preclude to use the market to allocate resources efficiently. Now, suppose that a polluting factory forced certain residential properties, whose value is equal to \$2 million, to relocate and that the possible cost for such a polluting factory to relocate is equal to \$3 million. On this basis, in a case of nuisance between the factory and the owners, the court decides that the factory prevails on the property. It may be likely that the unhappiness for the owners is higher than the happiness of the factory (several shareholders with a small stake in the enterprise) to avoid to pay \$2 million. In this case, a judgment has been efficient, but it does not have maximize happiness<sup>24</sup>.

But why the pursuit of happiness should be considered morally superior to the pursuit of happiness? Posner stressed the concept that the central idea of utilitarianism is the scope to get individual enjoyment, self-indulgence, and hedonistic values because they might increase individual happiness, and the sums of these satisfaction highs the satisfaction of society.

On the contrary, wealth maximization gets a stronger moral principle because tends to more distributive and corrective justice. This principle is, in fact, based on the idea that resources are scarce and the rights have to be qualified in respect of the costs of protecting them, transaction costs and problems of conflict use. Certainty, such theories could not only used in case of property rights, as the example above, but to all valued things that are scarce<sup>25</sup>.

Another clarification to be made is that Judge Posner's efficiency starts with two efficiency theories: Pareto efficiency and Kaldor-Hicks efficiency<sup>26</sup>. As it will be better explained below, Judge Posner considers that even if Kaldor-Hicks efficiency criterion has many drawbacks, it is the best to be defended because it may be conciliated with the principle of consent.

Summarizing these two notions of efficiency, allocation of resources is Pareto superior to another if at least one person is better off under the first than under the second and no one is worse off. Moreover, allocation of resources is Pareto-optimal if and only if there is no alternative state that

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<sup>24</sup> *Id.* at 64.

<sup>25</sup> *Id.* at 72-74.

<sup>26</sup> Economics considers at least four efficiency notions: (i) productive efficiency, (ii) Pareto optimality (iii) Pareto superiority, and (iv) Kaldor-Hicks efficiency.

would make some people better off without making anyone worse off. In order to solve distribution problems created by Pareto efficiency, Kaldor and Hicks has founded another concept of efficiency, considering that one state of affairs (E1) is Kaldor-Hicks efficient to another (E2) if and only if those whose welfare increases in the move from E1 to E2 could (hypothetically) fully compensate those whose welfare diminished with a net gain in welfare.

Posner criticized the Pareto efficiency, considering that its allocation of resources does not take into account if everyone affected by the change has consented to it. Instead, he thought Kaldor-Hicks notion of efficiency a more appropriate criteria to be harmonized with wealth maximization approach since it allows the reference to idea of consent. As a consequence, it becomes more compatible even with markedly egalitarian theories of justice<sup>27</sup>.

This point must be stressed in order to understand that, according to Posner, the freedom of the individual cannot, in any way, be subordinated for the sake of efficiency and, as a consequence, the maximization of efficiency must necessarily imply the individual autonomy of choice. More specifically, according to Posner, it can be assumed that all the subjects that constitute a society have given their “prior consent” to the application of the rules by judges who were seeking to maximize wealth. Therefore, even those who lose a case have given their prior consent to the implementation of the same rules of law that specifically disadvantage them. In other words, Judge Posner wrote that if an individual buys a lottery ticket and then loses, he can be said to have consented to that loss from the outset. This vision, according to the same author, also takes the Paretian system outside of utilitarianism, combining it with a more “Kantian” vision of individual autonomy as a principle superior even to that of utility<sup>28</sup>.

For the mentioned purpose, wealth maximization could also be viewed as a foundation not only for a theory of rights but to the concept of law. Law is a command deriving by a coercive power but, to be counted as law, the command must embed the following elements: (i) it can be complied by its

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<sup>27</sup> Kaldor himself defended its concept with an appeal to an ethical argument involving government. It seems to suggest that after the issuing of a policy, the losers deserve compensation and that the government should grant such compensation to them, getting a wealth increase. This could be awarded if it assumed that the government takes decisions on ethical grounds.

<sup>28</sup> See Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 Hofstra L. Rev. 487, (1980).

recipients; (ii) it does not have to treat differently similar situation (iii) it must be public; (iv) it has to be coercively applied in procedural way which consent to ascertain the truth of facts. All these elements are included in the wealth maximization perspective, which it can be called the economic theory of law.

In this sense, the primary function of law in economic theory is that it has to alter incentives for its recipients in a way that its recipients shall follow it. Moreover, the idea to treat equals in an equal way means that law must be rational and falls with the deductive logic of the system provided by economic theory: all results must be consistent with each other. Also, the idea of public law is consistent with the economic theory of law: if the law is considered a system for altering incentives of its recipients, the contents of law must be known by its recipient before that events occur and, as a consequence, it must be public.

Finally, the economic theory implies that the existence of procedural machinery for ascertaining the truth of facts. This because without efficient enforcement of the law, no incentives could be altered by it <sup>29</sup>.

### III. ECONOMICS OF CIVIL JUSTICE

Allocation of resources that maximizes efficiency is usually determined by the market. But when the cost of market determination (in terms of transaction costs) becomes higher than the cost of the legal determinations, peoples go in court. Consequently, the legal system determines the allocation of resources that maximizes efficiency.

For analyzing the common law and civil justice through the lens of efficiency, Posner made comparisons and distinctions between the market and the legal system <sup>30</sup>.

Regarding comparisons, the market and legal system have several parallels in terms of the decision-making process.

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<sup>29</sup> See RICHARD A. POSNER, *supra* note 17, at 73-75.

<sup>30</sup> See RICHARD A. POSNER, *supra* note 2, at 399-405.

Firstly, like the market, the legal system uses price equal to opportunity costs to induce people to maximize their efficiency.

Furthermore, like the market, the legal system faces the individuals with the costs of acts but leaves decisions to take or not a specific decision to the individual. Consequently, an individual would follow a command only if the price to pay for disobedience to it is higher than the value to commit an illegal act.

Moreover, like the market, the legal system relies on its administration on the behaviors of private individuals, litigants, and lawyers, motivated by self-interest rather than officials. In such respect, the number of officials (judges) is not so higher. This because officers have fewer stakes in a case than a lawyer or litigants. They also have less incentive to cooperate since their economic interest would be only indirectly affected by the outcome of the case.

Another parallel is that, like the market, the legal system is competitive. To this effect, the adversary system places the court as a consumer that has to choose between two different salesmen. In fact, the critical stage of a process is determined by the competition between a plaintiff and a defendant.

In addition, like the market, the legal system is impersonal: the invisible hand of the markets has its counterpart in the invisible hand of the judge. The rules of the process are written in a way that the judge has no interest in a particular outcome of the case before him.

Lastly, like in the market, in the legal system, the allocation of a resource may affect the distribution income and wealth. But decisions are taken on the criterion of efficiency (allocation) than on the ground of distributive justice.

Moving on distinctions, the differences between market and legal system are mainly two.

The first is that the legal system, contrary to the market, does not take into account the preferences of individuals in its allocation effort. Consequently, the most severe difficulty of a legal system is to determine value forensically. A judge could be reluctant to affirm a liability on a lawyer's argument regarding individuals' preferences.

Secondly, the legal system suppresses variances in value. In a market, placing by a person value on his home, which exceeds the market value, could seem reasonable and standard. The same evaluation does not function in the legal system. Furthermore, this lack is more acute in some cases, like

for the determination of damages for pain and suffering. People's sensitivity is virtually impossible to be measured, and consequently, the legal systems tend to award a standard of "average figure."

*A. The common law as an efficient system*

After having highlighted how the legal system should be analyzed in terms of efficiency, Posner provided justifications regarding why the common law could be considered an efficient system<sup>31</sup>. By this explanation, we could take specific grounds on why civil law could strain the inefficiency.

Several rules in the common law are the "*outcome of the practice of decision according to precedent (stare decisis)*"<sup>32</sup>. So, when a judge issues a decision, its outcome becomes a "precedent", therefore a reason to determine other similar cases in the same way. This means that, in the common law system, the body of precedents represents a capital stock. This because it could represent a stock of knowledge that provides services for litigants in the form of information regarding legal obligations<sup>33</sup>.

The common law system is itself an efficient system firstly because its production of decision and the respect of it by the recipients are costless. Secondly, it provides efficient results<sup>34</sup>.

This consideration could be justified on two grounds. The first is that, compared to the statutory process of making a rule, the judge-making rule process is a production where the producers are not paid. Neither the judge nor the lawyer receives any "royalty" or other compensation for a precedent who will guide several cases.

The second is that producing precedents increases the judge's value and recognition. Therefore, judges are interested not only in producing precedents but also on the following precedents. This because the condition to provide weight to an own precedent is to give such weight to prior

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<sup>31</sup> *Id.* at 419-427.

<sup>32</sup> *Id.* at 419.

<sup>33</sup> See George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. Legal Stud. 65 (1977).

<sup>34</sup> See Paul H. Rubin, *Why is the Common Law Efficient?*, 6 J. Legal Stud. 51 (1977).

decisions. This minimizes, together with the appellate review, problems of free-riders that could rise in such type of system.

Furthermore, the common law provides efficient rule compared to the continental system. In this respect, the first economic property of a system judge-making rules is that it reduces the costs of litigation. This because it enables parties to a case and tribunal to incorporate the information that has been generated in previous cases.

It has to point out that, in this respect, statistical evidence shows that a general precedent depreciates (it become obsolete, and it is overruled) slowly than a more specific precedent. This because the role of law (made by a judge or by legislator) is to solve uncertainty (creating information). Consequently, if a precedent is too specific, it is difficult to be used in another particular case, so uncertainty is not reduced. Therefore, this explains why the Supreme Court precedents are slower to depreciate.

Other than its speedy depreciation, another inefficient consequence of the particularization is the creation of uncertainty. As a consequence, the procedural costs to solve a case related to this uncertainty are high.

Moreover, a system of stare decisis is not a rigid system to change and, for this effect, it follows the pace of social, political, and economic change in a society rapidly.

Compared with the continental system, it can point out that the cost of production is higher since it is a statutory system. This because the enactment of a statute usually requires a majority and, according to an economic view, its transaction costs are very high (more the parties to the transaction are, more is the cost of the transaction).

In addition, the civil law system is full of particularization, and most of its legal rules are very detailed (think to substantial Italian administrative or labor rules). This is another inefficient aspect. As it has previously stressed, the general rules, compared with specific rules, have greater durability, and it is more costly to control behavior through a set of specific rules than a general standard.

Moreover, in a solely statutory system, adapting rules to social changes could be very costly: revising the rules follow the same path of its production and, consequently, the cost of this adaptation could be high and also slow.

In conclusion, in addition to the discussion regarding the efficiency to be pursued by specific rules of civil procedure, discussed in the following paragraph, the mentioned Posnerian concept regarding the common law



system brings into consideration. It shows as, in principle, certain inefficiency of the enforcement in some continental system, like Italian one, should not only depend by specific inefficiency rules of civil procedure but in the system of production of the substantive rules, in their high particularization, as well as in their process of revising.

*B. The scope of the procedural rules in terms of efficiency*

Firstly, it has now to be pointed out what means, in terms of costs, that a procedural rule is efficient. Secondly, who are the rational recipients of such rules in order to understand on what grounds rules will be followed.

According to Posner's approach, the efficiency of civil procedural rules aims at the "*minimization of the sum of two types of costs*" of the judicial machinery: the "*error costs*", the social costs generated when a judicial system fails to carry out the allocative or other social functions assigned to it, and the "*direct costs*", such as lawyers', judges', and litigant's time <sup>35</sup>.

It's easy to understand that "lawyers, judges and litigants" are also the "recipients" of civil procedural rules and that they are rational actors who seek, with their behavior, to maximize their returns from the litigation process.

It has to be highlighted out that Posner, in the analysis of civil procedural rules, started by criticizing specific traditional reforms which tried to reduce court delay by proposing methods like the simplification of the trial, the increase of the effective capacity of the courts, the appointment of additional judges.

Such types of reforms, according to Posner, have several drawbacks. To this effect, the scope of this reform is to solve the backlog of the courts by increasing the productivity of litigation expenditures. But, an increase in the output that a court may realize induces persons to increase their demand for litigations, as well as the litigants to increase the number of their litigation inputs, like expert witnesses. As a result, these types of reform lead to an increase in the demand for litigations and as a vicious cycle, increase the delay of court, albeit increasing efficiency <sup>36</sup>.

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<sup>35</sup> See Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. Legal Stud. 399, 400 (1973).

<sup>36</sup> See, e.g., Richard. A. Posner, *supra* note 3, at 124-139 (regarding the effect of the reform that pursued to reduce delay by adding judges. This reform led effectively to the reduction in delay but also the reduction of the settlement rate in the personal-injury area, as well as in other areas. The additional litigations brought by the failure of several settlements created a new source of the delay. Moreover, persons who were

As mentioned, the scope to increase efficiency should be to reduce error costs and, as a result, to increase the quality of the proceedings, as well as to reduce the direct costs of the system. It will, thus, provide examples of Posner's scrutiny regarding specific civil procedural rules in terms of efficiency.

To this effect, the Posnerian analysis could be divided into three groups of norms. The first group of norms regards incentives to judges. The second group of norms is the ones that affect the incentives significantly to lawyers and, as a consequence, to litigants, such as rules regarding judicial fees or the rules on the class action. The third group regards the norms that have an impact in terms of the settlement rate on litigants.

### *C. The incentives for the judges*

One of the most interesting (for our purposes) Posnerian analysis regards the judicial administration system. According to Posner, one of the scopes of judicial administration is allowing courts to dispose- justly, expeditiously, and economically- of the disputes brought to them for resolution<sup>37</sup>.

This means the development of a rigorous economic theory of litigation and courts<sup>38</sup>. This analysis regards the behavior of the judge as an economic actor who also tries to maximize its economic efficiency. But what do judges maximize?<sup>39</sup>

Presumably, judges, like most of the people, seek to maximize a utility function that includes both monetary and nonmonetary elements (leisure, prestige, power). However, the rules of the judicial process have been drawn to prevent judges from receiving monetary payoff from taking certain decisions: they cannot be fired except for gross misconduct and all judges of the same level are paid the same regardless of their performance<sup>40</sup>.

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disputants under the existing conditions of delay that used another method of dispute resolution – such as arbitration – go back to court since they value the speedier resolution of the cases positively, creating another source of delay).

<sup>37</sup> *id.*

<sup>38</sup> William M. Landes, An Economic Analysis of the Courts, 14 J. Law and Economics, 61 (1971).

<sup>39</sup> See RICHARD A. POSNER, HOW JUDGES THINK (2008).

<sup>40</sup> See RICHARD A. POSNER, *supra* note 2, at 415.

It's necessary to make a brief explanation regarding the selection of the judges in the Federal system and their salary to highlight certain Judge Posner's preliminary and material consideration regarding such issues.

The Federal court system, according to article III of the U.S. Constitution<sup>41</sup>, has three main levels: U.S. District Court, U.S. Circuit Court of Appeals and U.S. Supreme Court. Each level of court serves a different legal function for both civil and criminal cases. These judges, often referred to as "Article III judges", are nominated by the President and confirmed by the U.S. Senate; they hold their offices until they retire, and their salaries cannot be reduced<sup>42</sup>.

One of Judge Posner's first analysis concerns the system of selection of the Federal Court<sup>43</sup>. The power of their appointment pertains, as mentioned, to President and Senate. The appointment of the Federal judges may be divided into three types: merit appointments, patronage appointments, and ideological appointments. The merit appointment is the one motivated only by the suitability for the position, and it is cleaned by political reasons<sup>44</sup>. Patronage appointment traditionally regards friends or supporters of a senator, the President, or the parties<sup>45</sup>. This type of appointment has the value to diversify the components of a court in the eyes of the different segments of the community. The ideological appointment is based rather than on political loyalty, on the view on the matters likely to come before

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<sup>41</sup> Article III of US Constitution governs the appointment, tenure, and payment of Supreme Court justices, and federal circuit and district judges.

<sup>42</sup> There are also thousands of non-Article-III federal judges (like administrative law judges and other adjudicative officers of federal administrative agencies, bankruptcy judges, federal magistrates) that work as "adjuncts" to Article III tribunals. These judges conduct many aspects of the pre-trial process and can preside over most non-felony trials, but are appointed to renewable four or eight-year terms.

In addition, there are also the "Article I" or "legislative" courts. Those are independent federal tribunals staffed with judges who are not subject to the tenure and salary protections of Article III, such as the courts of the United States' territories and the U.S. Court of Federal Claims, to panels organized under the guidance of federal agencies.

Finally, many federal judges use externs, law students working part-time and receiving credits for this work from their universities.

<sup>43</sup> See RICHARD. A. POSNER, *supra* note 3, at 13-21.

<sup>44</sup> Merit promotion of district judges of the court of appeal is the most common.

<sup>45</sup> This is the common type of appointment of the judges below the level of Supreme Court.

the court<sup>46</sup>. Judge Posner illustrated the high value of these various selection systems, mostly because a system based only on merit criteria could have deficiencies in the diversity of outlook, experience and also temperament. The more homogeneous the judges, the more likely to be consistent with one another in a severe case because they are drawing on similar values and experiences.

Moreover, another preliminary aspect in the Posnerian analysis of the judicial administration regards the discussion of the quality of the federal bench, in respect of salary, perquisites, and staff of federal judicial employment<sup>47</sup>.

One of the highest debated discussions regards salaries of Federal Judges is that they are considered very low<sup>48</sup>, especially compared to associate's salary of law firms. Moreover, during years, studies show as judges have perceived an increased workload, along with a reduction in their opportunities to supplement their salaries. The negative consequence of the quality of the judicial system is that federal judicial salaries remain too low to attract many of the most successful practitioners, as well as that their turnover is high.

Posner suggested not to increase such salaries merely but to perform more accurate reforms. The first is to entitle federal judges to automatic annual cost-leaving increases. The second is to abandon the principle of geographic uniformity of federal judicial salaries since the disparity to live in different cities. The third is to eliminate the difference between district and circuit judges<sup>49</sup>.

As previously mentioned, during years, federal judges have perceived an increase in workload that derives by the growth of the caseload. This issue is material for the purposes of this analysis since it will allow us, in the next

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<sup>46</sup> Ideological appointment is very common at the level of Supreme Court.

<sup>47</sup> See RICHARD. A. POSNER, *supra* note 3, at 21-50.

<sup>48</sup> See Jane Wester, *As Deadline Looms, NY Judicial Salary Commission Weighs Continuation of Link to Federal Pay*, New York Law Journal, November 21, 2019 (regarding the highest debated situation of the city of New York in such respect).

<sup>49</sup> See RICHARD. A. POSNER, *supra* note 3, at 34-36 (highlighting that the difference in salary between district judges and circuit judges has mainly the negative effect to contribute to a symbology in which the appellate judge is "higher" in the judicial order than a district court. This also increases the tendency of district judges to accept appointments regardless of their attitude).

paragraph, to make some reflections on one of the most serious inefficiencies of the Italian system: the backlog of its courts.

In such respect, Posner describes the steps taken by the court to deal with the increase of the caseload. More specifically, these steps are the increase of the judges working harder, the heavy reliance on an extrajudicial assistant (particularly law clerk), curtailment of oral argument, nonpublication of opinion, a trend toward establishing clear rules and the increased use of sanctions. Posner argued how most of these trends have been unfortunate and inadequate to solve the issues at stakes. An example could be made in respect of the negative impact on the quality of the decisions as a consequence of the increased use of law clerks<sup>50</sup>.

Posner reflected on the judge's misuse of law clerks, by delegating not just all research but a good deal of opinion writing to them. He proved this assumption, demonstrating the increase in length, footnotes, citations in federal opinions. This does not mean that judges have shown a lazy behavior, rather than they have mistaken the approach to speeding up the judicial machinery. More specifically, several judges turned to law clerk for an initial draft of legal opinions. But the first draft of a legal opinion generally represents the approaches taken in the opinion, and this approach could not take by a person who, obviously, does not have the life or legal experience of a judge. As a result, this misuse is reflected in the low quality of judges' opinions. As above explained, the decrease in quality of the opinions had a significant impact on the efficiency of the common law system. Long, full of footnotes and citations legal opinions decreased, over time, the value of precedents, they increased the uncertainty of the legal system, as well as they had an impact on stare decisis system. Judge Posner's suggestion in such respect was not to stop using law clerks but to use them only for research, as well as to show how negative could be the impact of these approaches. This teaches us how reforms should start with a severe analysis of the effect on efficiency. As usually happened, several challenges performed to solve inefficiency risk creating even more inefficient distortions.

Another example, according to Posner, of inefficient distortions is the curtailment of oral argument<sup>51</sup>. In such respect, Posner highlighted as many circuits, from 1960 to 1990, have eliminated oral argument altogether in the

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<sup>50</sup> *id.* at 139-159.

<sup>51</sup> *id.* at 139-159.

majority of their cases and have limited the time allotted to oral argument in each case. The value of the oral argument to judges is high for three reasons. Firstly, it gives to judge the chance to ask questions of counsel. Secondly, it also provides a period of focused and active judicial consideration of the case: the judge, during the oral discussion, is thinking about the case and nothing less. Thirdly, the curtailment of the oral argument is costly. This because, when a court limits or avoids hearing counsels, it will have to screen in detail parties' pleadings. The screening function, made by judges themselves or their staff, can be time-consuming and, consequently, "*time is spent saving time*"<sup>52</sup>. To conclude, oral argument has the significant value of compelling judges to devote bloc, however short, uninterrupted time to the case, after which draft the decision and assign the opinion. As a consequence, the curtailment of oral argument is a method that increases, rather than decreases, the delay.

Another unfortunate reaction to the caseload, closely associated with the curtailment of oral argument is, according to Posner, the nonpublication of opinion. Since an unargued case is less likely to be decided well than an argued one, an unpublished method has become the usual method of disposing cases. This encourages sloppiness of essential issues, makes it difficult to determine when an opinion merits publication and especially, distorts litigants' perception of winning as well as, give to a recurrent litigant over a one-timer. This grows uncertainty and creates a distortion of the demand of litigations.

After having discussed the unfortunate approaches to resolve the caseload issue, Posner tried to present specific solutions. Most specifically, with the background of his experience, he proposed reforms<sup>53</sup> to be taken, working on incentives to judges.

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<sup>52</sup> *id.* at 162.

<sup>53</sup> *Id.* at. 193-385 (Posner, generally, identified five incremental reforms: (i) raising the price of access to the federal courts; (ii) limiting or abolishing the diversity jurisdiction; (iii) improving the methods for equalizing workloads among judges and for provide incentives for expeditious performance of the judicial function; (iv) requiring persons having legal disputes to seek private substitutes for judicial-making (alternative dispute resolution) before they can litigate in federal court; (v) reforming the bar so that lawyer provide greater assistance to judges in screening and disposing of cases; (vi) moving towards a system of specialized federal appeal courts; (vii) reforming administrative review to reduce the role of Article III judges. In addition, he identified two fundamental reforms, i.e., radical realignment of state and federal jurisdiction, and encourage judges to exercise "judicial self-restraint" and improve the "judicial craft").

The reform hereinafter analyzed, functional (as it will be shown in the next paragraph) for our purposes are the following: (i) improving the methods for equalizing workloads among judges and for providing incentives for expeditious performance of the judicial function (better management); (ii) moving towards a system of specialized federal courts; (iii) improving the “judicial craft”. It will be now briefly analyzing the significance and the results of each of the mentioned reforms.

The first way suggested by Posner affects the evaluation of judges’ work<sup>54</sup>. In such respect, the judicial administration seems an enterprise in which the principal workers have a system of tenure highly rigid, and as a consequence, incentives to work hard are absent. Moreover, the judge’s output seems impossible to be valued. The first attempt that, according to Posner, has to be made is finding a system that evaluates the work of the judges both in a quantitative and in a qualitative manner. This would be a system that could provide big informational numbers to check the performance of judges. A method could be a publication of statistics concerning performance of each federal judge like number of motions that the district judge has under submission for more than thirty days, number of bench trials in which the judges have failed to render a decision within six months, number of his cases that are still pending after three years. These could be considered “delayed dispositions” and when a judge has a high number of cases in any one of these categories, his chief or the circuit of his chief should analyze his position in order to understand reasons for such delays. Such delays are not necessarily motivated by the judge’s laziness; instead, they may depend on the necessity of distributing a equal number of cases among judges. Although, if the delays depend on the wrong behavior of judges, this could incentive his chief to “come down” on him with greater or less vigor. But, it also has to be given importance to another dimension of judicial performance, the quality of the judge’s outcome. To this effect, Judge Posner proposed the method of counting the citations (in judicial decisions and in treatises, casebooks, and law review articles) to a judge’s opinions, as a measure of judge’s influence.

Another proposal considered the necessity of specialization of federal courts<sup>55</sup>. Even if he showed several concerns regarding specialization, he found that specialization in court could be high benefits. In such respect,

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<sup>54</sup> *Id.* at 221-236.

<sup>55</sup> *Id.* at 221-236.

specialization could lead to reduce the number of inter circuit conflicts, to lessen legal uncertainty by reducing the variance of perspective on similar cases, to increase technical competence of the decisions and the coherence with the field. As a consequence, the result has a positive impact on the common system, especially in terms of quality. The high quality of the decisions could reduce uncertainty and, therefore, increases the settlement rate since the stakes of litigants could be more clearly defined.

Prominent among Judge Posner's reform is improving the "judicial craft"<sup>56</sup>. This means dealing with some of the recurrent issues of the judicial technique like the judge's institutional responsibilities or the style in writing of judicial opinions. The poor judicial technique has one of the factors that has aggravated the caseload. It leads to delay, needless disagreement, animosity, laxity in controlling the course of litigation, legal uncertainty and sheer muddle and, as a consequence, an increasing number of lawsuits and judicial resources needed for such lawsuits. Increasing the quality of judicial technique means alter the judges' attitude toward particular aspects of their job.

With respect to institutional responsibilities, Posner proposed to rethink to the American system in the direction of the German system of the trial procedure by issuing specific procedural rules that minimize abuse of process. According to Posner, those include judicial control of the process of fact-gathering, which minimizes the discovery abuse, judicial designation and examination of witnesses, no civil jury, a career judiciary and specialized court. The reader may notice that these rules already belong to the Italian rules of the process. The importance of this specific Judge Posner's analysis, as we will see better in the next paragraph, is twofold.

Firstly, it confirms the value of the comparison of the rules from the point of view of efficiency. Secondly, it shows that institutional rules must be aimed at affecting not only on the parties (as was the case in the last Italian reforms) but also on the judicial responsibilities of the judges.

Moreover, as mentioned several times, one of the main drivers of the caseload is the uncertainty of the law, which increases the incentives of parties to litigate. Now, the uncertainty finds its first source in the opinions (or decisions) of the judges. Posner noted as opinion are the excessive length, self-indulgent, full of citations, footnotes. This also increases another caseload, the ones at the Court of Appeal. This approach to

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<sup>56</sup> *Id.* at 335-382.



opinions, also followed by the Court of Appeal increases another caseload, the ones at the Supreme Court. In such respect, incentives should be created, affecting the judge's reputation. The use to issue unpublished opinions have an obvious negative effect on such respect. Judge Posner persevered on force judges to sign and publish opinions. It would be created a method for binding opinion to the name of the judge with a high audience. The incentives on the reputation of judges should be incremented in order to allow the issuing of clearer opinions.

#### *D. The incentives for the lawyers*

Lawyer's time represents one of the sources of legal cost of the proceeding<sup>57</sup>. It has to be noticed that incentives for lawyers are strictly related to incentives for parties, as it will be shown. In this sense, Posner analyzed the function of specific measures affecting both parties' and lawyers' choices in litigation. In particular, reference is made to rules regarding the contingency fee, the fee-shifting, and the class action.

The contingency fee, the method of paying a lawyer in which no money is paid until a successful result is achieved, is an obvious incentive in litigation for the lawyer. Less obviously, it eliminates obstacles to litigate<sup>58</sup>. This is less obvious since the common discussion on contingency fees regards the fact that it is exorbitant. But a contingency fee is a way to reduce obstacles to litigate for the cost of legal services since it resolves problems to borrow money in legal claims<sup>59</sup>. It's not possible, as well known, to borrow money against a legal claim. This because banks may find it too difficult to calculate the likelihood of a specific outcome in a case. These factors could create access to court prohibitive in many cases, increasing the error costs of a system. But a contingency fee is an adequate solution in such respect: lawyer lends his services against a share of the claim. The lawyer could reduce his risk by adopting this lend, specializing in contingency fees, since he can pool several disputes and minimize the variance of the returns.

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<sup>57</sup> See Steven Shavell, *Suit Settlement and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. Legal Stud. 55, (1982).

<sup>58</sup> See RICHARD A. POSNER, *supra* note 2, 448-449.

<sup>59</sup> Ronald R. Braeutigam et al., *An Economic Analysis of Alternative Fee Shifting Systems*, 47 Law and Contemporary Problems 173 (1984).

Moreover, since his knowledge of the case, he can make an accurate estimation of the risk of his loan. So, the method solves information problems that not allow banks to sustain by loans a litigant in a legal proceeding. Nonetheless, the higher cost of a contingency fee is justified since it compensates a lawyer not only for his legal services but also for the loan of those services.

Another way to justify the costs of the lawsuit is the English (and Continental) fee-shifting rule or the indemnity rule, i.e., the practice of requiring the losing party in litigation to reimburse the winning party's attorney and witness fees<sup>60</sup>. An interesting aspect of studying the fee-shifting rule is its effect on settlement rate, as well as his impact on small claims<sup>61</sup>. Posner believed that this rule has an increasing impact on the expected value of the litigation of each party<sup>62</sup>. Under this rule, a plaintiff receives a more considerable net benefit if he wins and sustain a more considerable net loss if he loses. The analysis is equal to the defendant. Hence, in the case of a litigant is risk-averse, as commonly he is, the fee-shifting rule could encourage settlement, reducing direct costs of dispute resolution. Despite this positive aspect, the loser pay rules is an inadequate method of vindicating small claims for three reason<sup>63</sup>. Firstly, the indemnity is not complete as it seems since the plaintiff's time and bother is not compensated.

Moreover, the expected cost of litigations could exceed the value of the litigation; even the plaintiff is sure to win.

Besides, this indemnity rule does not create, as the class action does, economies of scale between small claims. For instance, if there are 1000 identical claims of the value of \$10 each, and the cost of litigating each one is \$100. Even if the probability of prevailing is 100%, the indemnity rule does not provide an efficient solution. This because all these plaintiffs will spend \$100,000 in aggregate to vindicate these claims. On the contrary,

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<sup>60</sup> For an in-depth analysis of the fee-shifting rule see CHRIS W. SANCHIRICO, *PROCEDURAL LAW AND ECONOMICS*, *ENCYCLOPEDIA OF LAW AND ECONOMICS*, 2d ed., 8, 2012, § 271-307;; see also Bradley L. Smith, *Three Attorney fee-Shifting Rules and Contingency Fee; Their Impact on Settlement Incentives*, 90 Mich. L. Rev. 2153 (1992).

<sup>61</sup> See Avery Katz, *The Effect of Frivolous Lawsuits on the Settlement of Litigation*, 10 International Review of Law and Economics 3 (1990).

<sup>62</sup> See Richard A. Posner, *supra* note 35, 428-429.

<sup>63</sup> See RICHARD A. POSNER, *supra* note 2, 450-455.

using a class action, the expenses of the suit would be only a small fraction of the \$100,000 to vindicate the same claim.

The best way to justified small claims could seem, as explained, Rule 23 of the Federal Rule of Civil Procedure regarding class action<sup>64</sup>. As shown, it is an efficient system in case of small claims. But, regarding an incentive for lawyers, the class action could have a weakness. There is, in fact, a potential conflict of interest between the lawyer and the member of the class<sup>65</sup>. The lawyer wants to maximize his returns in terms of fees by the judgment. As a result, it is more interested in his fee than in the outcome of the judgment. For effect, he could be tempted to settle with the defendant for a small outcome in favor of the class action members and with a high attorney's fee. This behavior is incentivized by the small perception that class members have of the cases. Since the stakes are small, they also do not have a great incentive to supervise the lawyer's activity. To this effect, Rule 23 provides that the court has to approve the settlement to check this conflict of interests.

But, the effectiveness of this control could be doubted. This because the sources of information are not bright for the judge: a judge has the information given by the lawyer that, in such cases, could hide specific details. The right way to reduce such conflict of interest problem is wholly in the competition among lawyers. If a lawyer could induce a class member to hire him, objecting to the other lawyer settlement proposal. In this respect, the judge may have an independent source of information<sup>66</sup>.

#### *E. The incentives for the litigants*

An in-depth analysis of the incentives provided by specific rules of civil procedure to litigants should start, as Judge Posner suggests<sup>67</sup>, by the study of the conditions which bring parties to litigate before the court rather than

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<sup>64</sup> See Donald N. Dewees et al., *An Economic Analysis of Cost and Fee Rules For Class Actions*, 10 J. Legal Stud. 155 (1981).

<sup>65</sup> See Richard A. Posner, *supra* note 35, 440-441.

<sup>66</sup> For a comparative analysis on class action see JÜRGEN G. BACKHAUS ET AL., *THE LAW AND ECONOMICS OF CLASS ACTIONS IN EUROPE, LESSONS FROM AMERICA* (2012).

<sup>67</sup> *Id.* at 400.

to settle<sup>68</sup>. Since, usually, settlement costs are lower than litigation costs, and the number of the case settled help to understand the determinant of the total direct costs of the legal disputes. Litigation occurs when the plaintiff's minimum offer is higher than the defendant's maximum offer. The minimum offer of the plaintiff represents his expected value of the litigation (the value of the judgment if he wins), plus settlement costs, multiplied by his estimated probability of winning, minus the value of the litigation expenses. Instead, the maximum offer of defendant represents his expected value of the litigation (the cost of his litigation expenses), plus the cost of an adverse judgment, multiplied by his estimated probability of plaintiff's winning, minus settlement costs.

For this effect, any measure that reduces the plaintiff's minimum offer or increases the defendant's maximum offer, affecting one of the mentioned variables, will reduce the likelihood of litigation. On the contrary, any measure that increases the plaintiff's minimum offer or reduces the defendant's minimum offer, affecting one of the mentioned variables, will increase the likelihood of litigation.

Having laid down how to calculate the effect of reform on the settlement rate, Posner made an effort to study this effect in relation to specific procedural rules. An example will be showed below.

This example aims to show the relevance to the settlement rate of the pretrial discovery<sup>69</sup>. The Federal Rules of Civil Procedure promulgated in 1938 represented a new approach to the pretrial procedural. The traditional approach gave high importance to a precise and detailed formulation in the first pleadings. On the contrary, the 1938 Federal Rules of Civil Procedure contemplated much more summary pleadings but elaborating methods that give relevance to a sort of "pretrial discovery" of each party. This new rule starts on the assumption that a detailed pleading at the first stage of the case is premature since, during the proceeding, parties have the opportunity to obtain a better knowledge of the facts. Thus, the question is: what procedural theory can produce a higher settlement rate?

The principal cause of litigation is a sort of mutual optimism of the parties to win that may derive by each party's lack of information on the other party's position. During the bargain of the settlement, every party is hostile

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<sup>68</sup> See Gary M. Fournier et al., *Litigation and Settlement, an Empirical Approach*, 71 Review of Economics and Statistics 189 (1989).

<sup>69</sup> *Id.* at 422-427.

to show information to the other party. This because if the settlement negotiations would fail, it loses the value of surprising the other party by displaying the information at trial. Under the traditional approach to pretrial procedure, the parties had an incentive not to show their information. Instead, the reform has reduced this incentive. Thus, according to the pretrial discovery rule, each party can obtain relevant information about the other party before the trial, putting an end to the surprise effect<sup>70</sup>.

One of the relevant results got by Posner is that a pretrial discovery provision could enable each party to improve and refine its estimates on the outcome of the case by reducing uncertainty and optimism in the outcome. For this reason, in most of the cases, the pretrial discovery could be an efficient rule to reduce the backlog of the court, by incrementing the settlement rate. The effect of a type of pretrial discovery rule could be analyzed with respect to Rule 35 of the Federal Rule of Civil Procedure. This rule permits the defendant, in a case regarding the plaintiff's health or fitness, to have him examined by an expert designated by the defendant<sup>71</sup>.

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<sup>70</sup>Please note that in the context of civil cases in the US, the pre-trial phase of litigation, during which the parties disclose to each other information and documents that may be relevant to the claims and defenses in the case. The Federal Rules of Civil Procedure authorize several methods of discovery, including initial disclosures (Fed. R. Civ. P. 26(a)(1)); depositions (Fed. R. Civ. P. 27-32); interrogatories (Fed. R. Civ. P. 33); requests for production of documents or inspection (Fed. R. Civ. P. 34); requests for admission (Fed. R. Civ. P. 36); expert testimony (Fed. R. Civ. P. 26(a)(2)).

<sup>71</sup>Fed. R. Civ. P. Rule 35 – Physical and Mental Examinations.

(a) Order for an Examination. (1) In General. The court where the action is pending may order a party whose mental or physical condition—including blood group—is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in its custody or under its legal control. (2) Motion and Notice; Contents of the Order. The order: (A) may be made only on motion for good cause and on notice to all parties and the person to be examined; and (B) must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it.

(b) Examiner's Report. (1) Request by the Party or Person Examined. The party who moved for the examination must, on request, deliver to the requester a copy of the examiner's report, together with like reports of all earlier examinations of the same condition. The request may be made by the party against whom the examination order was issued or by the person examined. (2) Contents. The examiner's report must be in writing and must set out in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests. (3) Request by the Moving Party. After delivering the reports, the party who moved for the examination may request—and is entitled to receive—from the party against whom the examination order was issued like reports of all earlier or later examinations of the same condition. But those reports need not be delivered by the party with custody or control of the person examined if the party shows that it could not obtain them. (4) Waiver of Privilege. By requesting and obtaining the examiner's report, or by deposing the examiner, the party examined waives any privilege it may have—in that action or any other action involving the same controversy—concerning testimony about all examinations of the same

In the case that the defendant could, through Rule 35, become more aware of the conditions of the plaintiff's injury that is higher than he expected, the defendant will be led to increase his estimate of the his expected cost. The pretrial discovery measure thus increases the defendant's maximum offer. As a consequence, it makes the settlement more likely, reducing the amount of the pending litigations in cases where injuries are serious.

In conclusion, pretrial discovery rule could induce to reduce direct costs of the litigations, incentivizing parties to settle.

It has to be highlighted that the measures that tend to reduce settlement rates could also have a negative effect. They increase the error costs and, as a consequence, even the direct costs. This because trials are sources of detailed information about outcomes of litigating that parties use to calculate expected values of litigations and, consequently, to measure the minimum and the maximum settlement offer.

#### IV. A METHODOLOGY FOR REFORMING ITALIAN CIVIL JUSTICE

##### *A. Statistical data and clarifications*

The difficulties of the implementation of the Economics (micronomics) Analysis of Law in Italy derives, mainly, as mentioned, by the distress of civil-law jurists to some economic-legal approaches, that have an empiric basis as its starting point or founded on the doctrine of the legal precedent.

The implementation of these approaches in civil law systems could be even more challenging with civil justice, since it is the field of law that, by definition, seems to reject the logic based on empirical fact in a system of "civil law." Nonetheless, the idea of "efficient enforcement" is material, considering the impact of the quality of it on the economy, specifically on

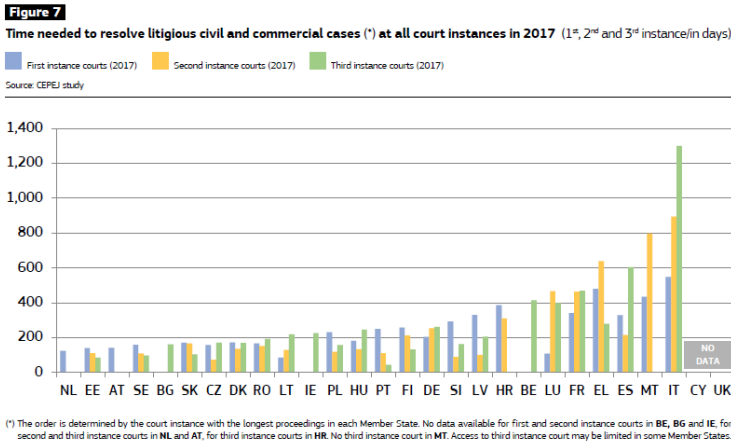
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condition. (5) Failure to Deliver a Report. The court on motion may order—on just terms—that a party delivers the report of an examination. If the report is not provided, the court may exclude the examiner's testimony at trial. (6) Scope. This subdivision (b) applies also to an examination made by the parties' agreement, unless the agreement states otherwise. This subdivision does not preclude obtaining an examiner's report or deposing an examiner under other rules.

the increase in the scale of the enterprises, as well as on the growth of financial, credit and product market <sup>72</sup>.

In such respect, this article aims to show how the Italian legislator should take into account an economic methodology approach to solve one of the biggest struggles of the Italian law system, i.e., the inefficiency of its civil justice.

Firstly, the reader's attention must be drawn to the data concerning the efficiency of the Italian judiciary system. To this extent, the 2018 European Justice Scoreboard shows the following scenario <sup>73</sup>:



<sup>72</sup> See LUIGI A. FRANZONI & DANIELA MARCHESI, *ECONOMIA E POLITICA ECONOMICA DEL DIRITTO*, 261 (2006).

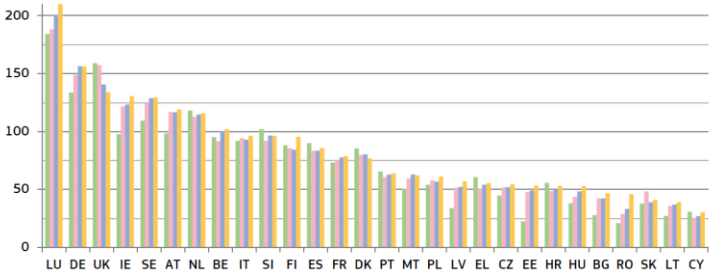
<sup>73</sup> See The 2019 EU Justice Scoreboard, Publication Office of the European Union, (2019) [www.publications.europa.eu](http://www.publications.europa.eu).

**Figure 28**

General government total expenditure on law courts (\*) (in EUR per inhabitant)

2010 2015 2016 2017

Source: Eurostat

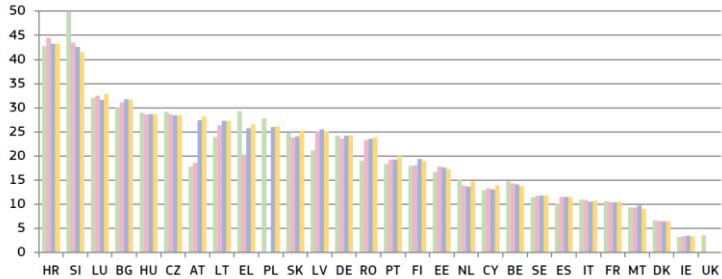


**Figure 32**

Number of judges (\*) (per 100 000 inhabitants)

2010 2015 2016 2017

Source: CEPEJ study

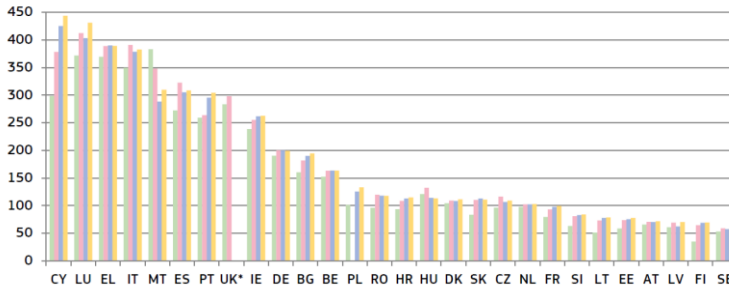




**Figure 35****Number of lawyers (\*) (per 100 000 inhabitants)**

2010 2015 2016 2017

Source: CEPEJ study



As it stands, Italy is one of the European countries where the civil judiciary system is less efficient, considering that during 2017: (i) the average time to resolve a civil and commercial litigation at all court instances was about 1,300 days (the worst European data, taking into account that the referred analysis does not include UK and Cyprus); (ii) the general government expenditure per habitant was not low (about Eur 100 per inhabitant); (iii) the number of judges per 100,000 inhabitants was one of the weakest of the European countries (about 10 judges per 100,000 inhabitants); (iv) the number of lawyers per 100,000 habitants was one of the highest of the European countries (about 380 lawyers per 100,000 inhabitants).

It has to be highlighted the necessity of overcoming of an incorrect legislative approach regarding the subjects of the last Italian reforms of civil justice. This approach is the primary cause of the default of the Italian civil judiciary system and represents the starting mistake made by the Italian legislator of such reforms. Specifically, the last reforms have etched, almost exclusively, on the rules which regulate the strictly procedural part of a litigation, namely those governing the moment in which the parties are or are about to be “in court” <sup>74</sup> [(e.g., reforms on compulsory mediation

<sup>74</sup> See the “Dossier del Servizio Studi della Camera dei Deputati (XVIII legislatura) -*Efficienza della giustizia civile*- 22.03.2018” (2018), [www.camera.it](http://www.camera.it)

(*mediazione obbligatoria*)<sup>75</sup>, compulsory negotiation (*negoziazione assistita obbligatoria*)<sup>76</sup>, brief trial (*rito sommario*)<sup>77</sup>].

This legislator's approach to reforms reflects the idea that only preventing disputes or cutting civil procedural terms is possible to achieve an efficient regulation of civil justice. As suggested, this article starts with the purpose of overcoming this approach. By using the categories and Posner's analysis, the starting points of a possible reform of the civil justice will be identified in the rules that regulate the framework of the civil judiciary system. More specifically, the rules that regulate the job and the career of lawyers and judges, as well as the incentives to settle for litigants (affecting their stakes in disputes rather than forcing them to settle).

Following this path means, firstly, to understand that a serious reform of the justice system cannot, on the one hand, neglect to use concepts of efficiency elaborated by the theorists of the Economic Analysis of Law and, on the other hand, to use, through the method that combine "Economics and Civil Procedure Law," an analysis of a comparative type. In such respect, every matter should be subjected to a comparison between domestic law and more efficient legal systems. It should be noted that this latter analysis might be made more accessible by a circumstance. One of the two mentioned disciplines, Economics, is universal. Its micro-economic categories, regardless of the place of creation, may be transferred and incorporated in any other legal system, with the aim to find the point of intersection with the legal categories that are, by definition, specific and domestic.<sup>78</sup> Obviously, by making this comparison, the immanent difference between the legal systems shall be carefully considered and handled in the attempt to transfer the solutions reached in a legal system to another. Actually, the point of intersection between Economics and Law

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<sup>75</sup> The D.lgs no. 28/2010, requires that, for some specific cases, the claimant must first try to resolve the issue through mediation prior to filing a claim in Court.

<sup>76</sup> The Law no. 162/2014, requires that, for some specific cases, the claimant must first try to resolve the issue through an amicable agreement with the defendant, assisted by their lawyers and without an impartial third party.

<sup>77</sup> Italian civil Procedure Code, Art. 702-bis provides a special brief trial. Compared with the ordinary action, this procedure is faster, since it is based exclusively on the evidence provided by the parties in their initial briefs. However, it issued only in those cases when the plaintiff is already in possession of the documentary evidence necessary to allow the Court (i) to make a prompt assessment of the case and (ii) to issue a decision in a very short time.

<sup>78</sup> See ROBERT COOTER ET AL., *supra* note 13, 10.

reflects the characteristics of a particular legal system, also in terms of incentives given to its economic operators.

### *B. The method*

One of the highest challenges of the economic analysis of justice is to choose a concept of efficiency and, consequently, detecting the dimensions whereby to measure the efficiency of the judiciary system.

To this extent, examining the notions of efficiency discussed by the Economic Analysis of Law, it might be helpful to use the above analyzed Posner's concept of efficiency, namely the theory of "wealth maximization". This concept helps us to examine how and why recipients of civil justice rules, i.e., judges, lawyers, and litigants reacting to civil procedure rules.

Moreover, the factors of civil justice in relation to which the recipients of civil procedure rules compare the efficient degree of their behaviors might be: (a) the fairness of the judgment, (b) the time to resolve disputes, (c) the public and private costs of civil actions. It's relevant to state that these three factors shall not be analyzed as aspects capable independently of determining the efficient (or inefficient) degree of a judicial system. These endogenous components of a lawsuit, indeed, have different contact points because every rule that affects one of them carries out consequences on another one. For instance: (i) affecting/modifying public or private costs of civil action, would have consequences on parties' incentives to begin a litigation or to settle the dispute, consequently also on the obstruction of civil justice and on time to solve a dispute; (ii) affecting a trial phase (like a reform that increases time of the evidentiary phase) shall increase public and private costs; (iii) reforming the attorney's fee system shall affect time to resolve dispute; (iv) reshaping the judiciary frame (judges' numbers, methods of recruiting, degree of specialization, carrier progression) shall impact on the type of analysis of certain type of litigations, and on the developing of a sort of stare decisis, affecting, thereby, lawyer's behaviors (as also parties' behaviors) in courts.

The first lesson provided by Posner's analysis is that the obstruction level (in terms of time to resolve disputes) is not the reason for the inefficiency of civil justice but its direct consequence. This clarification is not meaningless. The legislator of Italian last reforms, affecting only the above-mentioned rules, seems to follow the idea that slow justice has been the reason for the inefficiency of the system.

For this reason, by introducing compulsory mediation (*mediazione obbligatoria*) or by cutting processual terms, persons would have prevented litigations, or the course of a dispute would be quickened.

On the contrary, the concepts of the Law and Economics suggests that a slow justice is a consequence of the ineffectiveness of the system and, consequently, reform would have to affect other factors like (i) the judicial machinery work in order to maximize the efficiency level of its output, for instance by rules suitable to reduce the backlog (ii) the convenience of lawyers to extend time of a litigation, such as modifying the methods to determine its costs (iii) the convenience of eventual losing litigants to settle, reforming incentives provided by trial costs rules.

### *C. The Civil law system*

After having determined the conceptual basis of my analysis, it's relevant to make a general reflection regarding the inherent inefficiency of the civil law system, as well as to understand what rules should be affected by an efficient reform of civil justice.

It has to be highlighted that, as above mentioned, the civil system does not seem to be an intrinsic efficient system. This because, being a statutory system, it appears to be more costly and rigid. The method of production rules by legislative power is an expensive system since producers of law have to be paid for their output.

As a consequence, rules are highly specific and detailed. This because they serve as a command not only toward parties but also judges. But this means that such rules depreciated rapidly. This, together with the costly and lengthy method to modify regulations, leads rigidity to pace social, political, and economic change in society.

Now, this reflection does not allude to the need for an Italian constitutional reform in the sense of a judge-making rules system. This is a way to reflect how giving substantial value to precedents should have a positive effect also on the efficiency of the judiciary system.

This concept is not apparent. This means thinking in terms of a different approach that judges should have to precedents, especially to the Supreme Court's precedents. It cannot be disregarded how, according to Posner's

doctrines, the uncertainty of law is the primary source of the caseload, increased by particularized and rigid rules. It is, therefore, crucial to reflect on the role of judges on these terms. This stresses how the definition of a more homogeneous system should start by the value that judges give to precedents, as well as, by a sort of their duty to conform to such precedents for similar cases.

There are three groups of rules which, if modified, may affect both the supply and the demand of justice, duly differentiated- as made above- on their recipients, namely judges, lawyers, and litigants.

#### *D. The incentives for the judges*

Concerning the first group of rules (the ones direct to judges), economic and sociological doctrines suggest to analyze judicial behaviors as strictly related and affected by court structures<sup>79</sup>.

It will be necessary to reflect on the judge as an economic operator that is affected by incentives of rules governing (i) variation in selection (ii) life tenure; (iii) progression of career in relation to the value income and the reputations and power; (iv) monitoring mechanisms; (v) degrees of specialization, (vi) distribution.<sup>80</sup> Based on these elements, subsequently, it will be decisive to analyze how an amendment of their regulation may impact on the output provided by judges both on quality and on quantity aspects, and also on the reduction of the backlog of the civil judicial system.

Taking a cue from the Posnerian reflection, previously analyzed, considerations should be first made about the monitoring mechanism on the output of the judges. The only monitoring mechanism is the possibility to

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<sup>79</sup> See CHRIS W. SANCHIRICO, *supra* note 60, at 309.

<sup>80</sup> See Richard A. Posner, *supra* note 35; see also JEFFREY A. SEGALAND & HAROLD J. SPAETH, *THE SUPREME COURT AND ATTITUDINAL MODEL REVISITED*, (2002); Peter H. Aranson, *Models of Judicial Choice as Allocation and Distribution in Constitutional Law*, 1990 BYU L. Rev. 745 (1990); William M. Landes & Richard A. Posner, *Legal Change, Judicial Behavior and the Diversity Jurisdiction*, 9 J. Legal Stud. 367 (1980); Robert D. Cooter, *The Objectives of Private and Public Judges*, 41 Public Choice 107 (1983); Avery Katz, *Judicial decision Making and Litigation Expenditure*, 8 Int. Rev. Law and Econ. 127 (1988).

appeal a decision. But this is a control on the quality (in terms of justice, fairness, due process) on the output of judges. What misses is control also in terms of behaviors of judges, like the possibility to enforce monitoring mechanism that controls the litigations “in the decision phase” (in decisione) for several months, the number of cases pending after three years, the long-time between hearings scheduled by the judge for the same case. This mechanism could help on the one hand, to “come down” to judges that tend to these “delayed dispositions” without a justified reason and, on the other hand, to consider reassignment of cases if a judge is workload.

Moreover, the possibility of a monitoring mechanism could also incentive the issuing of rules on recognitions, in non-monetary (like progression in career) or monetary terms (only for a variable portion of their salary), to judges who work more than others.

A monitoring control could have an impact, especially on reputations of judges since it affects, in such sense, the possibility of having career progression, as well as monetary incentives. But the result is that the judges could carefully manage and take under control the caseload, avoiding “delayed dispositions” or may rely on redistribution of work in case of he is workload.

Another reflection on the salary of judges should be made in terms of the possibility to abandon, even in Italy, the geographic uniformity of judicial salaries: it could not be left away from the significant disparity, even in Italy, to work and live in different cities. This because, especially in cities where the cost of living is high, the salary of judges seems to be inadequate to their role and their responsibilities. This should be taken carefully into account since, as said, the increasing, during years, of the caseload has not been followed by the increase in the salary. Especially in cities where the cost of living is high, incentives for the judge to increase their commitment in order to dispose of the backlog, are too low.

Moreover, also in Italy, there is another type of judge named the honorary magistrate (*magistrato onorario*), allowed by Article 106 of the Italian

Constitution<sup>81</sup>. His selection is not made by means of competition (as for ordinary judges) but by means of a selection on the basis of qualifications. Moreover, his jurisdiction is limited with respect to certain types of disputes, and their office has a temporary duration (three years, renewable one times for the other three years). Their role is mainly to reduce the workload incumbent on the ordinary judges, and it has a significant weight actually in Italy in such terms. But, there are complaints about the quality of their decisions that frequently leads lawyers and parties to appeal to them. So, such circumstance does not depend merely on the laziness of such magistrates. It is highly in Italy a debate regarding the salary of the honorary magistrates. More specifically, an honorary magistrate is paid - after hearing - Eur 98 gross for up to five hours of hearing and another Eur 98 gross for more than five hours. The five hours of the hearing are calculated per the second minute (so if there are breaks between one and the other, they do not apply). Such amount should also cover (compulsory) social security contributions, travel expenses (often from afar), and all the time lost in studying files and writing measures (ten times the time of hearings). Making thus a net count of its salary, we reach at the figure of about three euros per hour (calculated precisely taking into account also the contributions that will pay, costs incurred, time for study, and drafting measures, training). Thus, it is obvious that this type of retribution could have drawbacks in terms both of negative incentives on the quality of their output but also in terms of low interests by the most qualified jurists to hold this office. As an effect, the high uncertainty derived by their output increases the demand for justice both in terms of negative impact on the settlement rate and in terms of the Court of Appeal's caseload.

Therefore, an incremental reform affecting caseload should be a severe reorganization of this significant office of the judicial administrations, also in monetary terms, with a more rigorous system of selection, the in-depth evaluation of organic plants, the strict identification of skills and methods of replacement, the introduction of appropriate forms of welfare, the

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<sup>81</sup> COSTITUZIONE ITALIANA [CONSTITUTION] Article 106.2 "The law regulating the Judiciary may envisage the appointment, also by election, of honorary judges for all the functions performed by individual judges." [Translation supervised by the Senate International Affairs Service 2018, <http://www.senato.it/1024> ) (It.)].

regulation of the temporariness of the tasks with extensions related to assessments of professionalism and performance.

*E. The incentives for the lawyers*

Concerning the second group of rules, the Italian lawyers' activity has been affected, over time, by symbolical reforms. Moreover, lawyers' activity is affected by a patchy regulation, and lawyers' incentives frequently represent litigants' incentives, considering their strict interrelationship. For these reasons, this part of the analysis is focused on the rules on methods to define fees, particularly the inefficient Italian system of lawyer' retribution per judicial phases (*sistema di retribuzione "a fasi"*), named the tariff system and the incentives for enforcing a contingency fee<sup>82</sup>. As a result, the aim of this reflection is to understand how a reform regarding the lawyer's fee should have an impact on caseload.

Under Italian law usually, there is a fee agreement by and between client and his attorney; if there is no agreement, a compulsory fixed tariff system will apply, based on the activity carried out in the proceeding and depending on the jurisdiction and the value of the proceeding<sup>83</sup>.

The most common types of fee agreements are mainly two: (i) a "flat fee", according to which a lawyer provide a specific, total fee to represent client in the dispute (a common type if a case is relatively simple or routine) or (ii) a "hourly rate fee" according to which lawyer will be paid for each hour (or portion of an hour) that he works on the case.

The flat fee is a system to incentive a speedy definition of the case instead of the hourly rate. Nonetheless, the flat fee could not provide incentives for lawyers to get a positive outcome of the case since it will be paid both in case of a positive and a negative outcome. This means a positive impact on a caseload but a negative impact on the quality of the assistance.

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<sup>82</sup> See Steven Shavell, *supra* note 57; see also Bradley L. Smith, *supra* note 60.

<sup>83</sup> Ministerial Decree no. 55/2014, art. 1.



On the contrary, the hourly rate could lead incentives for the lawyer to stay in court or to perform unnecessary activities (more work hours, more retribution) but it could be preferred, especially by the client since it, in principle, allows him to monitor the work of the lawyer. This means a negative impact on the caseload but a positive impact on the quality of the assistance, in monitoring terms.

In any case, a high incentive in both sense system could be the contingency fee: the possibility to provide that the fee should be a percentage of the award, only in case of a positive award. This could be a significant incentive since, on the one hand, it allows lawyer's best effort on the case, but it also incentives him to get a speedy definition of the case, avoiding unnecessary activities. But, the Italian system is reluctant to a contingency fee since it provides limits on his application. To this effect, Law no. 247/2012 provides that "*agreements by which a lawyer receives as compensation, in whole or in part, a portion of the disputed asset or the disputed right shall be prohibited*"<sup>84</sup>. Therefore, it is lawful for the parties to execute written agreements that re-proportion the professional fees to the achieved results, without however referring in any way to the shares of the asset or the portion of right under dispute. Agreements in which fees have as their object (even if only partially) this good or right are prohibited. This means that the use of a success fee or a contingency fee is very limited or risky. According to the abovementioned Posnerian reflection on the contingency fee and on his positive impact on caseload, it should be efficient to allow lawyers, also in Italy, to provide this type of fee agreement.

Nonetheless, if parties do not provide any fee agreement, a compulsory fixed tariff system will apply. The tariff system provides that lawyer's fee should be determined in relation to a four-phase of the dispute: the study phase (including investigative activity), the introductory phase of judgment, the trial phase stage (comprehending requests, pleadings, the whole litigation activity, any action which that is functional for evidence search or presentation), the decision-making phase. Every phase has an average fee,

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<sup>84</sup> Law no. 247/2012, art. 13.4.

which could be increased (up to 80%) or reduced (up to 50%), depending on the particular circumstances of the case. Now, this system should also create a negative incentive on lawyers' activities and a negative impact on the judiciary system in terms of the caseload. Indeed, the tariff system incentivizes lawyers to stay in court or to carry out a high amount of activities in every phase: if the dispute is long-lasting and full of activities, lawyer's retribution is increased. This has also a negative impact on the settlement rate. In this case, a more effective system would be a fixed fee, i.e., a fee that is entirely unrelated to both the number of activities carried out in the trial and the duration of the case or a system as German one, where the lawyer obtains a significant part of his fee even if the parties reach a settlement before the start of the trial or, at the latest, by the first hearing.

#### *F. The incentives for the litigants*

Finally, concerning litigants, it is worthy to analyze the economic theories regarding the study of their behaviors to set out the reasons for a "pathological" demand for justice. To this effect, following Judge Posner's school of thought, any rules which may have an impact on litigants should be taken into account as a condition that brings parties to litigate than to settle.

The Italian legislator has provided rules like mediation or negotiation that, in a specific type of dispute (usually disputes where the demand of justice is high), force parties to try settling before commencing the trial. But the provisions by which parties must be before a mediator (as in mediation procedure) or in the same room with their lawyers (as in negotiation procedure) do not allow any modification of parties' stakes in the dispute. For this reason, most of these procedures end with a negative outcome (no settlement) and as, a consequence, the parties are allowed to bring the case before the court.

This implies that a dispute lasts even longer (its natural time plus the time of the mediation or negotiation the procedure) and also the parties born other costs (these procedures are not costless in terms of tax and fee for lawyers). This means that methods designed to lighten the caseload increase

it. This because they have not, in any way, affected the incentives of litigants to settle. As Judge Posner teaches, reforms working on incentives of litigants should rather enhance pretrial discovery, for instance, by obliging the parties to be able to request certain types of evidence already in a preventive phase. A possible reform in Italy in such sense could strain to force preventive technical investigations in certain types of claims for damages (as it is in the case for damages in health matters) or pretrial hearing of witness. This reform could seriously alter the parties' stakes since they become more aware of their position compared to the adverse party, and, as a result, it should lead to an increase in the settlement rate and decrease caseload.

## CONCLUSION

This article does not pretend to provide the most appropriate proposals to the Italian legislator to reform civil justice. Instead, these pages aim to transmit the definition of a method that should guide the new reforms. The first lesson of the Economic Analysis of Law, as well as of the Posnerian doctrines, is precisely this. The guide to efficiency cannot fail to pass, even in civil justice, by the analysis and the study of the tools provided by Economics. Moreover, serious reform of the process in Italy cannot resolve the backlog of courts by cutting procedural deadlines or forcing the parties to settle. A severe reform cannot ignore the analysis of the systems of access, selection, career advancement, methods of remuneration, the framing of all legal professions, as well as the reasons that most affecting parties' stakes before the court.

Besides, this type of analysis makes compulsory the study of models in more efficient legal systems to find solutions to the pathological results of the Italian system, like models on judges' careers or lawyers' fees system.

At the end of this analysis we should be able to answer to this question: are we sure that the Italian system has a sort of (unavoidable) natural entrance wall to models of rules that may reduce the level of inefficiency of

the judicial system, or the Italian legislator has been, over time, careless to their significance?