"Doing Business" as a Purpose of Civil Justice? The Impact of World Bank Doing Business Indicators on the Reforms of Civil Justice Systems: Italy as a Case Study*

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A. The discourse about the purposes of civil justice systems is a classic topic of civil procedure scholarship.[1] The distinction between conflict-resolution and policy-implementation goals as elaborated by Mirjan Damaška in his seminal book on the faces of justice and state authority[2] can serve as an appropriate starting point. The downsides of this distinction are well-known.[3] Yet, the presence of dichotomies within the field of civil procedure is deeply rooted in its history. Civil procedure has suffered, probably more than other fields of law, from the fixing of boundaries among branches of law, in particular from the great divide between private and public law, which is a historical peculiarity arising from natural-law doctrine (XVII and XVIII century).

According to the natural-law doctrine, the raison d'être of civil procedure is to overcome the *status naturalis* in the *status civilis*, as a means to

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1 This first section draws on *Caponi*, Harmonizing Civil Procedure: Some Initial Remarks, in: Kramer/Hess (Hg.), From Common Rules to Best Practices in European Civil Procedure, Nomos/Ashgate, 2017.

2 *Damaška*, The Faces of Justice and State Authority, 1986.

3 *Zekoll*, "Comparative Civil Procedure", in: Zimmermann/Reimann, The Oxford Handbook of Comparative Law, 2006, 1335.

overcome resort to self-help.[4] The regulation of civil proceedings became a fundamental part of public law,[5] constituting a pillar of state building in continental Europe: the prohibition of self-help and state civil justice, as a trade-off for such a prohibition. On the other side, the basic elements of civil proceedings (from standing to sue, to adjudication) were aimed at protecting the "new bourgeois individual" and his economic freedom in a fragmented and individualistic perspective on social relationships. Thus, civil procedure was Janus-faced or acted as an interface: one face looked to public law, as civil proceedings are mainly set up by the state; the other looked to private law, as civil proceedings aim to protect individual rights. The great divide between private and public law caused the theory and practice of judicial protection of rights to be affected by a sort of magnetic field and to oscillate between these two opposite conceptual poles.

The tension between the private interest of litigants and the public interest of the State as a provider of dispute resolution services is an "eternal" feature of civil procedure. However, the extent to which the State (or the polity) is involved in the business of dispute resolution may vary considerably across time, ranging from a minimum in which the only relevant public interest is to keep the conflict-resolution services running at the minimum cost, chiefly providing incentives for the litigants to settle their dispute through an alternative dispute resolution procedure, to a maximum in which the resolution of the dispute is the occasion for the State (or the polity) to apply a body of substantive law, implementing where appropriate social goals and policies going beyond the mere resolution of a dispute. This holds even truer in the European Union, as the regulation of disputes with cross-border implications by the European law of civil procedure is a remarkable example of the presence of public policy concerns, in terms of the unobstructed operation of the internal market and development of an area of freedom, security and justice. Therefore, taking into account current developments in western legal systems, the key opposition, as to the goals of civil justice systems, appears to be between the "pure and simple" (interest-based) settlement of disputes and the application of the law on the occasion of

4 *Nörr*, Naturrecht und Zivilprozess, 1976, 3, 48.

5 *Boehmer*, Ius publicum universale, ex genuinis iuris naturae principiis deductum et in usum iuris publici particularis quarum cunque rerum publicarum adornatum, Halae Magdeburgicae, 1710, 499.

the (settlement of the) dispute. In this context, the only shared principle (besides independence and impartiality of the court, and the right to be heard) might be the key element of a common political culture, which places the rights of the individual at the centre of economic, social and legal activity. Placing the individual at the centre of the economic and legal system follows the principles of party autonomy and party disposition that shape dispute resolution methods. Accordingly, it is for the parties and not the government to choose suitable dispute resolution methods and to decide upon its commencement, scope and termination.

One is confronted with two competing accounts of the role of civil justice. There is the older (or rather: classical) one, according to which European states, as polities embodying the rule of law, are committed to the principle that relationships among its citizens must be governed by the law and not by the survival of the fittest. Dispute resolution methods should also be governed by a system of public and private law fairly applied and evenly enforced. Since the government is involved as provider of dispute resolution services, the state justice system has a duty to implement public policies that go beyond the "pure and simple" resolution of the dispute. The first policy is to enable the parties to choose dispute resolution mechanisms in a way that is truly free and informed, removing various barriers to access to justice. Second, to apply the law on the occasion of a dispute is the primary purpose of the civil justice system. The resolution of the dispute is not only about protecting individual rights. Nor simply is it about restoring peace between the parties to a dispute. The determination and enforcement of rights leads to the ongoing development and improvement of the law itself. The law is preserved in judgments, and only judgments can develop the law.

By contrast, a newer account of dispute resolution emerged in the great debates on ADR in the mid-1980's in the United States and in the mid-1990's in Europe, as well as the subsequent implementation of ADR programs on both sides of the Atlantic, which was an essential break with tradition in Western dispute resolution. Until then, settling a dispute through an out-of-court agreement or litigating the case before courts and seeking adjudication reflected the individual choice of the parties. After the large scale development of ADR schemes, the alternative between settlement and adjudication has become an institutional choice.

Litigation before state courts, on this model, tends to be a last resort. There is a general preference for alternative dispute resolution over judicial proceedings before state courts and hard law. By way of example, according to the Consumer ADR Directive, even when the ADR entity "imposes" a particular outcome on the consumer, this solution need not comply with the general law – but only with that part of consumer protection law that the parties cannot derogate from to the detriment of consumers (Art. 11).[6]6 Further arguments to support ADR procedures point to those kinds of disputes which are more suited for settlement through mediation and other alternative dispute resolution approaches.

B. The aim of my presentation is to show the extent to which the use of indicators for evaluating and comparing the performance of national judicial systems is not only able to describe the state of affairs in the civil justice systems, which are the target of these surveys, but also to exert pressure for changes in the purposes of the judicial systems at large.

C. There is no generally shared meaning for the term 'indicator', but for the sake of this paper the following definition suffices:

> "An indicator is a named collection of rank-ordered data that purports to represent the past or projected performance of different units. The data are generated through a process that simplifies raw data about a complex social phenomenon. The data, in this simplified and processed form, are capable of being used to compare particular units of analysis (such as countries, institutions, or corporations), synchronically or over time, and to evaluate their performance by reference to one or more standards".[7]

The production of indicators in global governance has, from the start of this century, rapidly spread.[8] Focusing only on the use of indicators in cross-country comparative surveys of judicial systems, one

6 *Wagner*, "Private Law Enforcement through ADR. Wonder Drug or Snake Oil?", 51 Common Market Law Review 2014, 165, 177.

7 *Davis/Kingsbury/Engle Merry*, Indicators as a Technology of Global Governance, in: 46 Law & Soc'y Rev. 71 Law and Society Review, 2012, 71, 73.

8 For a global account, *Davis/Fisher/Kingsbury,* Governance by Indicators. Global Power through Classification and Rankings, 2012; *Davis/Kingsbury*, Indicators as Interventions: Pitfalls and Prospects in Supporting Development Initiatives, 2011, http://www.rockefellerfoundation.org, (zuletzt abgerufen 22.9.2017).

can enumerate a number of institutions that create or propagate indicators. Most influential are the data about the performance of judicial systems that are produced – within wider comparisons including rankings on the attractiveness of different legal systems for doing business – by the Doing Business Project (World Bank Group).[9]

This project found fertile ground not only in developing countries, but also in Europe, where the "sound operation" of the internal market, i.e. a policy relating to the economic growth, represented the public policy goal that led to the adoption of rules of judicial jurisdiction intended to be both highly predictable and to simplify the enforcement of judgments in the Member States.[10] In light of the success of the Doing Business annual reports, it is not difficult to explain the emergence of detailed evaluation report on European judicial systems, published every second year since 2006 by the European Commission for the Efficiency of Justice (CEPEJ)[11]. This biennial report aims to measure and compare the efficiency and effectiveness of European judicial systems. It has been used since 2013 as a database to create a simplified and more appealing information tool, which aims to shed light on the quality, independence and efficiency of justice systems as co-determinants of economic growth in the Member States of the European Union[12] Finally, in 2013 a cross-country inquiry into the performance of judicial system with a wealth of measurements and quantitative data was carried out under the auspices of the Organization for Economic Co-operation and Development (OECD).[13]

9 www.doingbusiness.com, (zuletzt abgerufen 22.9.2017).

10 ECJ 10 February 1994 – Case C-398/92 *(Mund & Fester)* [1994] ECR I-474 is a landmark decision on the link between the Brussels Convention and European integration. The Maastricht Treaty placed judicial cooperation within the competence of the Justice and Home Affairs Pillar of the European Union (the so-called third pillar). The Amsterdam Treaty amended Art. 65 of the EC Treaty to give the Community competence for "improving and simplifying […] the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases". On that basis, the Brussels Convention was replaced by Council Regulation EC 44/2001 and the underlying public policy concerns have been widened towards the objective of maintaining and developing an area of freedom, security and justice, where the free movement of persons is ensured. Under the Lisbon Treaty, this subject matter is governed by Arts. 67 and 81 Treaty on the Functioning of the European Union (TFEU).

11 The CEPEJ was established in 2002 within the Council of Europe. www.coe.int, (zuletzt abgerufen 22.09.2017); the fifth report was published in 2014, *Uzelac*, Efficiency of European Justice Systems: The Strength and Weaknesses of the CEPEJ Evaluations, in International Journal of Procedural Law, 1 (2011), 106.

12 The tool referred to is the EU Justice Scoreboard published since 2013 by the EU Commission. http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2014_en.pdf, (zuletzt abgerufen 22.09.2017).

13 *Palumbo/Giupponi/Nunziata/Mora-Sanguinetti*, Judicial Performance and its Determinants: a Cross-Country Perspective, http://www.oecd.org, (zuletzt abgerufen 22.09.2017).

The increasing use of indicators to evaluate and compare judicial systems may at first be difficult to understand. It is indeed pertinent to ask to what extent the diversity of arrangements and institutions through which justice is administered around the world can be grasped and equalized by a kind of one-size-fits-all toolbox of indicators. Answering this question would require a close look at the social processes surrounding the creation and use of indicators in the field of civil procedure.

D. One can start along this path by assessing the impact of indicators on the reforms of the Italian civil justice system in the last ten years.

In the early summer of 2014, the Renzi government announced a number of reforms of the judicial system.[14] The programme also included changes in the field of civil procedure, which were rapidly enacted in Autumn 2014.[15]

These changes aim to both decrease the duration of civil proceedings at first instance and to reduce the huge backlog of cases before the Italian courts. Whether the legislator should take action is assessed through comparative data about the duration of civil proceedings in a dozen countries, drawn on the "Doing Business 2014" Report of the World Bank. Further numerical data about backlogs of cases, the "productivity" (i.e. clearance rate) of courts, and the duration of proceedings are taken from the 2014 edition of the "EU Justice Scoreboard", issued by the EU Commission.[16]

According to these surveys, when a business operating in Italy files a lawsuit, it must wait three times longer to obtain a final decision *vis-a-vis* competitors operating in Sweden, the best performing judicial system among those taken into consideration. The Italian government claims that undue delays hamper economic growth and, secondly, violate the right to a fair trial.[17]

Relying on these data, the Italian government decided to take action, which involved promoting a kind of court-annexed arbitration, and negotiation supported by the parties' counsel.

14 http://tinyurl.com/pnfz9tf, (zuletzt abgerufen 22.09.2017).

15 Decree no. 132/2014 and Law no. 162/2014.

16 http://preview.tinyurl.com/kvbxk4g, (zuletzt abgerufen 22.09.2017).

17 European Convention of Human Rights, Art. 6; Italian Constitution, Art. 111.

This short account brings to light a number of significant elements: first, the use of indicators to evaluate the performance of a judicial system in comparative perspective; second, the reliance on indicators created or propagated by international institutions, such as the World Bank and the European Commission, rather than on those produced by domestic agencies such as the National Institute for Statistics (Istat),[18] which is the main producer of statistical data in Italy, or the Ministry of Justice[19], which is the main producer of judicial statistics, institutions which are in a closer position to gather data about the Italian judicial system; third, the overriding consideration that the performance of the domestic judicial system primarily impacts the country's economic growth, and as a secondary concern delay jeopardises the right to a fair trial; fourth, the capacity of indicators to determine the need for reforms, stimulating them, and orientating their substance.

Yet, the most surprising element does not emerge from the above narrative. It is the complete silence of Italian legal scholarship in civil procedure about this set of phenomena,[20] although their existence along with the reform process of civil procedure can be traced back to 2005, less than two years after the first appearance of the Doing Business Reports.[21] This is easily explained through illuminating the differences between the key aspects of the reform process in Italy before and after the advent of the Doing Business Project.

E. Civil litigation in Italy is governed by the Code of Civil Procedure, which entered into force in 1942 and is still in force, although it has been heavily amended.[22] Most reforms had been adopted by specific laws, dedicated to civil procedure, mostly amending the code.[23] They pursued different, even opposing goals over time, and have been more or less successful at achieving these goals: lawyers' laziness had been perhaps

18 www.istat.it/en, (zuletzt abgerufen 22.09.2017).

19 www.giustizia.it, (zuletzt abgerufen 22.09.2017).

20 *Graziadei* (Hg.), Annuario di diritto comparato e di studi legislativi, 2012, which does not specifically address the use of indicators in the field of civil procedure, the only (partial) exception being *Takahashi,* The emergence of judicial statistics in England and Wales, 81.

21 The first report Doing Business 2004 was published in 2003.

22 *De Cristofaro/Trocker*, Civil Justice in Italy, 2010, 1.

23 Cf. above all Law no. 581 of 1950; Law no. 533 of 1973; Law no. 533 of 1990; Law no. 374 of 1991; Law no. 51 of 1998.

too much tolerated by the reform of 1950; proceedings had been perhaps too much tightened by the reform of 1973, regulating special proceedings about labor disputes. Each reform had rationales and objectives that are typical of procedural reforms, especially in a Civil Law country. On the one hand, reforms try to balance access to the courts and effective judicial protection of rights, on the other, they promote the right to be heard. In a few cases, laws introducing new substantive rights, or remarkable changes to existing rights, also included new procedural devices in order to ensure effective judicial protection of such rights.[24]

The last remarkable reform before the advent of the Doing Business Project consisted in the introduction of special proceedings concerning corporate disputes in 2003[25]. It marked a new approach to the regulation of ordinary proceedings, providing a number of written exchanges between the lawyers before the court is addressed in order to manage the proceedings. This kind of made-in-Italy 'adversarial' pleading from the outset bristled with difficulties for lawyers, and proved to be inefficient over time and therefore doomed to failure. It was abolished in 2009.[26] Yet, it was still in tune with the Italian approach to legislative changes in the field of civil procedure, as to three fundamental aspects: *a)* since the reform of 1973 (at the latest), the idea that the same procedural rules should be available for all civil law suits (i.e. the "transsubstantive" character of procedural rules, to speak in U.S. jargon) has been fundamentally rejected and an approach heading toward a "differentiated judicial protection of rights" has been adopted, with a view to ensuring a more effective judicial protection of rights (*tutela giurisdizionale differenziata*, an approach and expression coined by Andrea Proto Pisani)[27]; the reform of 2003 followed this approach, linking the introduction of new proceedings to changes in the field of corporate law; *b)* the purposes of legislative changes were quite typical of procedural reforms i.e. a more speedy and effective dispute resolution, in tune with the fair trial guarantee, without any reference to the country's

24 Art. 28, Law no. 300 of 1970, Statuto dei lavoratori.

25 Art. 12, Law 366/2001 and D. lgs 5/2003.

26 Law no. 69 of 2009.

27 In recent years, however, A. *Proto Pisani* seems to have changed his mind on this point, in light of misleading applications by the lawgiver over time, cf. Riflessioni critiche sulla tutela giurisdizionale differenziata, in Lavoro e diritto, 2014, 537.

economic growth (although such a reference might have been appropriate, in light of the substance of the reform); *c)* finally, the reform of 2003 was enacted by means of a specific law, dedicated to changes in the field of civil procedure.[28]

F. One can detect dramatic changes to this approach to civil justice reform since 2005, that can be fully explained only if takes account of the ongoing influence of the Doing Business annual reports and their success in attracting the attention of policy-makers and government officials in Italy.

The Doing Business Project has already provoked a considerable amount of reactions from legal scholars in the United States and beyond. Yet, there are a number of reasons why it is timely for a civil procedure scholar to intervene with comments[29]. First of all, the pilot-project that led to the launch of the Doing Business Project was a world-wide survey on civil procedure.[30] Secondly, consider the thesis underpinning the Doing Business Project, i.e. that legal origin impacts economic growth and the common law is more conducive to economic growth than the civil law. Now, while the difference between civil and common law might not be relevant for most areas of law surveyed by the legal origins literature, yet, the civil law/common law divide remains relevant for civil procedure.[31] Thirdly, both explanations proffered for the greater impact of the common law on economic development – greater independence of common law judges and the greater adaptability of the common law – are both mainly grounded in differences of procedure.[32]

By focusing on the key features of the Doing Business reports one can identify how these reports are the fundamental cause of the changes in Italian civil procedure since 2005.

28 Cf. Decreto legislativo no. 5 of 2003.

29 The Doing Business Project and has not gained the attention of civil-procedure scholars yet, with few exceptions, *Kern*, Justice between Simplification and Formalism. A discussion and critique of the World Bank sponsored Lex Mundi Project on Efficiency of Civil Procedure, 2007.

30 Cf. Working Paper n. 8890 (2002) of National Bureau of Economic Research (Cambridge, Massachusetts), http://www.nber.org, (zuletzt abgerufen 22.09.2017); *Djankov/La Porta/Lopez-de-Silanes/Schleifer*, Courts, Quarterly Journal of Economics, 2003, 453.

31 *Damaška*, The Common Law / Civil Law Divide: Residual Truth of a Misleading Distinction, in: Chase/Walker (Hg.), Common Law, Civil Law and the Future of Categories, 2010.

32 *Michaels*, Comparative Law by Numbers? Legal Origins Thesis Doing Business Reports and the Silence of Traditional Comparative Law, 57 The American Journal of Comparative Law, 765 (2009), 781.

First of all, changes in civil procedure are frequently included in "omnibus" statutes, no longer in specific (i.e. dedicated only to civil procedure) statutes. Such statutes normally introduce new regulations relating to a number of areas of the life of a business, e.g. starting a business, obtaining credit, paying taxes, trading across borders, enforcing contracts, resolving insolvency, etc. Most of these topics are included in the Doing Business report on the ease of doing business. Furthermore, such statutes are labelled with a kind of catch-all purpose, such as economic growth, development, and competitiveness.[33] Such statutory provisions are particularly apt to gain the attention of the Doing Business' expert team in subsequent rounds of evaluation, promoting a country's position in the global ranking.

Regulation texts are drafted more than ever by government officials, with little exposure to debate and critique. Indeed, government officials frequently attend international meetings and participate in international networks, where the pressure generated by international and regional ranking is far stronger than in a domestic setting.

Parliamentary control and ratification of governmental regulation is often carried out by the Industry or Trade Committees, where parliamentarians with a legal background are seldom present. Justice and Legal Affairs Committees, which are largely comprised of lawyers, play only a marginal role. This does not occur by chance, but reflects to some extent the main findings of the pilot study that triggered the Doing Business Project: "we find that […] formalism is systematically greater in civil than in common law countries, and is associated with higher expected duration of judicial proceedings, less consistency, less honesty, less fairness in judicial decisions, and more corruption".[34] It comes as no surprise that governments in civil law countries, which are eager to please Doing Business reports, try to marginalize the lawyers' role, particularly when they are civil procedure and litigation experts.

A further feature of the recent Italian civil procedure legislation, which can best be explained as a consequence of the pressure exercised by the Doing Business Report, is the proliferation of new statutes in the

33 Cf. Law no. 80 of 2005, Law no. 69 of 2009, Law no. 99 of 2009, Law no. 27 of 2012, Law no. 92 of 2012, Law no. 134 of 2012, Law no. 98/2013, Law no. 162 of 2014.

34 *Djankov/La Porta/Lopez-de-Silanes/Schleifer*, op. cit. (Fn. 31), 453.

last ten years. Since 2005, new statutory provisions have entered into force almost continuously, which tracks the cycle of the annual or biennial reports of the ranking institutions.

Moreover, it is the entering into force of the statutes that counts, and not its effective implementation, because the former can be better reckoned in statistics than the latter.

Mediation and arbitration are promoted instead of adjudication, because ADR is a cheaper means of dispute resolution than judicial proceedings.

Finally, grounds of judicial appeal are narrowed, as the delays they generate are not in tune with the theoretical model of an ideal court that eases business, whereby a dispute "can be resolved by a third on fairness grounds, with little knowledge or use of law, no lawyers, no written submissions, no procedural constraints on how evidence, witnesses, and arguments are presented, and no appeal"[35].

G. If I had the occasion to analyze the causes of the inefficiency of Italian civil justice system, I could easily show that the complexity and distinctive features of each national judicial system cannot be captured by the use of quantitative indicators.

By way of example, according to the EU Justice Scoreboard, "the efficiency of a judicial system should already be reflected at first instance, as the first instance is an obligatory step for everyone going to court". However, today, ordinary proceedings are no longer the key instrument for ensuring judicial protection of rights in Italy. In fact, over the last few decades, they are becoming less and less important, even residual, to that end. In order to take a correct view of the real states of affairs in Italy,[36] one should take into consideration a large number of "special" proceedings, which normally enable claimants to get effective and efficient judicial protection of rights in a wide range of situations. As of 2013, the number of cases brought into the courts by way of special proceedings

35 *Djankov/La Porta/Lopez-de-Silanes/Schleifer*, op. cit. (Fn. 31), 455.

36 Cf. for an inquiry into the causes of Italian civil justice system's inefficiency, s. *Caponi*, European Minimum Standards for Courts. Independence, Specialization, Efficiency. Glance from Italy, Paper presented at the conference "Europäische Mindeststandards für Spruchkörper", organised by Althammer, University of Regensburg Law School, and Weller, EBS Law School, at the University of Regensburg on 12–13 November 2015, in Althammer/Weller (Hg.), Europäische Mindeststandards für Spruchkörper, 2017, 139–164.

(especially payment orders and provisional measures) was substantially higher than the number of plenary proceedings.[37]

H. However, there is no basis for dismissing the use of indicators as so seriously deficient that they do not even deserve mention or contestation.

Exploring the Doing Business Project can be fascinating and rewarding for a lawyer, particularly a scholar in civil procedure, as it helps dispel the sense that civil procedure is distinct from the other fields of the law, to say nothing of the sense of remoteness of civil procedure from the society at large.

At first sight, this revelation seems to be in tune with Mauro Cappelletti's viewpoint about the role of procedural law. As he put it:

> Procedural law is not just about techniques – methods to regulate the business of courts. Procedural law, in the first place, details the role of government, through public courts, in settling disputes, creating new substantive rules and policies, and implementing policies through law. Important public policies are at stake in decisions about when to encourage parties to litigate, how to shape their factual and legal claims, and whether to promote a strictly legal resolution as opposed to a negotiated settlement. How much law regulates social behavior depends in large part on how the machinery of justice is constructed.[38]

However, the global ideological setting in which indicators have been implemented in the field of civil procedure is different from that one in which Cappelletti wrote. As U. Mattei put it:

> Cappelletti's work […] witnessed a moment of general optimism in the public interest model, an idea of an activist, redistributive, democratizing, public-service-minded approach to the public sector in general and to private law in particular. In this intellectual mode of thought, the Welfare State in Western Societies was seen as a point of arrival in civilization,

37 For further details on the special proceedings in the Italian civil justice system, s. *Caponi*, A Masterpiece at a Glance. Calamandrei, Introduzione allo Studio Sistematico dei Provvedimenti Cautelari, in: Cadiet/Hess/Requejo-Isidro (Hg.), Procedural Science at the Crossroads of Different Generations, 2015, 373–380.

38 *Cappelletti/Garth*, Introduction – Policies, Trends and Ideas in Civil Procedure, in: David et al. (Hg.), International Encyclopedia of Comparative Law, (M. Cappelletti Hg.), vol. XVI Civil Procedure, 1987, 1.

> and access to justice was the device through which communities could provide law as a public good, after having provided shelter, healthcare and education to the needy. Beginning in the early eighties, the global ideological picture had changed. Neo-liberal policies, inaugurated by prime minister Thatcher in Great Britain, […] and imported on a much weaker institutional background in Reagan's America, were based on the very basic assumption that the welfare state was simply too expensive. […] Public shelter, health, education and justice for the poor were the natural "victims" of such budget cuts.[39]

In my view the turn to neo-liberal policies had an influence on the development of the use of indicators in the field of civil procedure, but deepening this aspect would require a separate inquiry.

To conclude, indicators are tremendously successful in attracting the attention of policy makers and government officials, thus prompting considerable amounts of benchmarking, dialogue and reform[40]. Indicators can be beneficial to foster comparative knowledge of legal systems and promoting reforms. The information gathered through the creation and use of indicators needs however to be integrated and corrected, both on the descriptive and the prescriptive side, far more than it currently happens, by the "local knowledge" of lawyers and social scientists living and working in the targeted countries. This also reflects a certain methodological approach, which is best expressed by Clifford Geertz' words: "Like sailing, gardening, politics and poetry, law and ethnography are crafts of place: they work by the light of local knowledge".[41]

However, one should not endorse the Doing Business reports without reservation because they are redefining civil procedure in light of a single end (transaction costs, neoliberal agenda), whereas civil procedure is about rights and other social interests not reducible to economic efficiency.

I. *Zusammenfassung:* Quantitative Indikatoren für die Evaluation von Rechtssystemen zu verwenden, ist für einen Juristen ein riskantes

39 *Mattei*, Access to Justice. A Renewed Global Issue?, in: Boele-Woelki, S. van Erp (Hg.), General Reports of the XVIIth Congress of the International Academy of Comparative Law, vol. 2, 2007, 383.

40 *Davis/Kingsbury/Engle Merry*, Indicators as a Technology of Global Governance, Law & Society Review, 46 (2012), 71, 92.

41 *Geertz*, Local Knowledge. Further Essays in Interpretive Anthropology, 1983, 167.

Unterfangen, weil er oft keine Kontrolle über die Kriterien der Datengewinnung, -auswahl und -präsentation hat.[42] Trotzdem muss er sich irgendwie daran beteiligen, weil sich der Gebrauch dieser Indikatoren zur Bewertung und zum Vergleich der Leistungsfähigkeit von Rechtssystemen seit Beginn des 21. Jahrhunderts in bemerkenswerter Geschwindigkeit ausgebreitet hat. Indikatoren haben die Aufmerksamkeit von Politikern und Regierungsvertretern erregt; sie haben daher als Werkzeug europäischen und globalen Regierens einen starken Einfluss erlangt.

Wenn man sich nur auf den Gebrauch von Indikatoren in länderübergreifenden Vergleichsstudien der Justizsysteme fokussiert, kann man eine Reihe von Institutionen aufzählen, die Indikatoren schaffen oder propagieren. Am einflussreichsten sind die Daten über die Leistungsfähigkeit von Justizsystemen die – innerhalb eines breiteren Vergleichs einschließlich des Rankings der Attraktivität verschiedener Rechtssysteme für Geschäfte – im Rahmen des *Doing Business Projekts* der Weltbank-Gruppe geschaffen werden. Dieses Projekt hat nicht nur in Entwicklungsländern, sondern auch in Europa einen Nährboden gefunden. Im Lichte des anhaltenden Erfolgs der jährlichen *Doing Business Reports* erklärt sich, warum der sehr detaillierte Evaluationsbericht über die europäischen Justizsysteme, der seit 2006 alle zwei Jahre durch die European Commission for the Efficiency of Justice (CEPEJ) herausgegeben wird und darauf zielt, die Effektivität und Leistungsfähigkeit der Rechtssysteme der europäischen Länder zu messen und zu vergleichen, seit 2013 als Datenbank genutzt wird, um ein vereinfachtes und ansprechenderes Informationsinstrument zu schaffen: Das EU-Justizbarometer (EU Justice Scoreboard), das durch die Europäische Kommission herausgegeben wird und die Qualität, Unabhängigkeit und Effizienz der Justizsysteme als mitbestimmende Faktoren für wirtschaftliches Wachstum in den EU-Mitgliedsstaaten beleuchten soll. Das EU-Justizbarometer kann auf seine Weise die Zersplitterung der Rechtsgrundlagen zur Harmonisierung des Zivilprozessrechts in Europa (insbesondere Art. 81 und 114 AEUV, aber auch Art. 102 und 118 AEUV) überwinden, indem es die nationalen Justizsysteme überwacht und ihre Leistungsfähigkeit vergleicht, mit dem Ziel, sie in funktionaler Hinsicht *de facto* zu harmonisieren.

42 This summary in German draws on *Caponi,* Das "EU Justice Scoreboard" der Europäischen Kommission, Italien, in: Zeitschrift für das Privatrecht der Europäischen Union, GPR, 2016, 113–114.

Nach dem EU-Justizbarometer „soll die Leistungsfähigkeit eines Justizsystems schon in der ersten Instanz reflektiert werden, da die erste Instanz für jeden, der vor Gericht geht, ein notwendiger Schritt ist“. Hinsichtlich des italienischen Zivilprozesses trifft diese Aussage nicht zu. Ordentliche Erkenntnisverfahren sind in Italien nicht mehr das Schlüsselinstrument des gerichtlichen Rechtsschutzes. Tatsächlich sind sie in den vergangenen Jahrzehnten immer unwichtiger, ja sogar residual geworden. Um ein korrektes Bild der Lage in Italien zu erhalten, ist die große Zahl an Spezialverfahren zu berücksichtigen, die es dem Kläger normalerweise ermöglichen, in einer Fülle von Situationen effektiven Rechtsschutz zu erhalten. So war im Jahr 2013 die Zahl der beantragten Spezialverfahren (insbesondere Zahlungsbefehle und einstweilige Maßnahmen) wesentlich höher als die Zahl der ordentlichen Erkenntnisverfahren.

Auch der Abschnitt des EU-Justizbarometers zur richterlichen Unabhängigkeit ist insofern verbesserungsfähig, als er auf heterogenen Quellen basiert (Weltwirtschaftsforum zur „wahrgenommenen Unabhängigkeit“, European Network of Councils for the Judiciary und EU-Kommission zur „strukturellen Unabhängigkeit“), was zum Teil zu widersprüchlichen Ergebnissen führt.

Das EU-Justizbarometer hat noch einen langen Weg vor sich, um seine Ziele zu erreichen. Es ist zu empfehlen, dass die Kommission ihre Kompetenz in der Auswahl und Auswertung von Daten verbessert. Die Komplexität und die charakteristischen Besonderheiten eines jeden Justizsystems können durch die Fragebögen, die die Kommission in Zukunft in Europa versenden mag, nicht vollständig erfasst werden. Dennoch können Indikatoren nützlich sein, um vergleichende Kenntnisse über Justizsysteme zu fördern und Reformen zu begünstigen. Die Informationen, die durch die Schaffung und den Gebrauch von Indikatoren gesammelt werden, müssen viel stärker, als dies momentan geschieht, durch Juristen und Sozialwissenschaftler der betroffenen Länder einbezogen und gegebenenfalls korrigiert werden.